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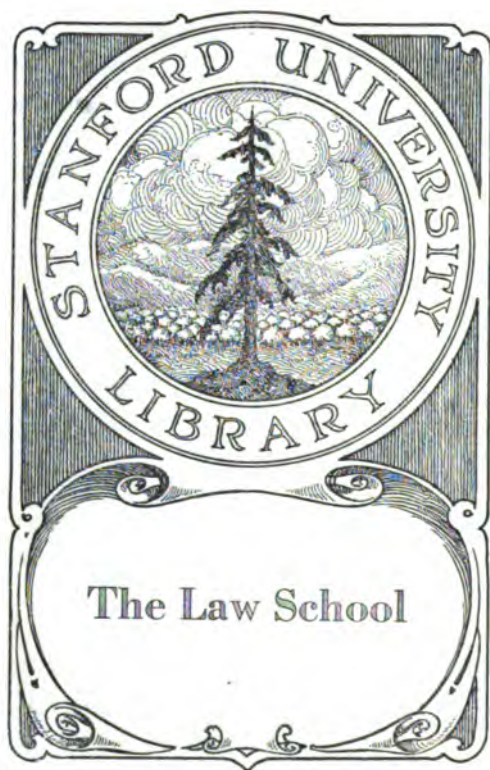
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H. L. GILLASPIE





REPORTS OF CASES

ARGUED AND DETERMINED

Mellaspie

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

EDITED BY

HENRY WHARTON, ESQ.

VOL. XCII.

CONTAINING

THE CASES DETERMINED IN TRINITY VACATION, MICHAELMAS TERM AND
VACATION, 1857, AND HILARY TERM AND VACATION, 1858,
XX. & XXI. VICTORIA.

PHILADELPHIA:

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REPORTS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF QUEEN'S BENCH,

AND THE

COURT OF EXCHEQUER CHAMBER

ON ERROR FROM THE COURT OF QUEEN'S BENCH.

WITH TABLES OF THE NAMES OF THE CASES ARGUED AND CITED, AND THE
PRINCIPAL MATTERS.

BY

THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE,

AND

COLIN BLACKBURN, OF THE INNER TEMPLE,

ESQRS., BARRISTERS AT LAW.

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JUDGES

or

THE COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. JOHN Lord CAMPBELL, C. J.

Sir JOHN TAYLOR COLERIDGE, Knt.

Sir WILLIAM WIGHTMAN, Knt.

Sir WILLIAM ERLE, Knt.

Sir CHARLES CROMPTON, Knt.

ATTORNEYS-GENERAL.

Sir RICHARD BETHELL, Knt.

Sir FITZROY KELLY, Knt.

SOLICITORS-GENERAL.

Sir HENRY SINGER KEATING, Knt.

Sir HUGH M'CALMONT CAIRNS, Knt.



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CASES

ARGUED AND DETERMINED

IN

Trinity Vacation,

XX. & XXI. VICTORIA.(a) 1857.

At the banc Sittings in the Queen's Bench, in this Vacation, all the learned Judges occasionally assisted to constitute the Court.

DEWDNEY STEDMAN and SMITH STEDMAN v. HENRY
ATTWELL SMITH. *June 15.*

Plaintiff and defendant occupied adjacent plots of ground, divided by a wall, of which they were tenants in common. There was a shed in defendant's ground contiguous to the wall, the roof of which rested on the top of the wall across its whole width. Defendant took the coping stones off the top of the wall, heightened the wall, replaced the coping stones on the top, and built a wash-house contiguous to the wall, where the shed had stood, the roof of the wash-house occupying the whole width of the top of the wall: and he let a stone into the wall, with an inscription on it stating that the wall and the land on which it stood belonged to him.

Held, that on these facts a jury might find an actual ouster by defendant of plaintiff from the possession of the wall, which would constitute a trespass upon which plaintiff might maintain an action against defendant.

THE first count charged that defendant broke and entered a garden and premises of plaintiffs, and *broke down, damaged, and destroyed [*2 the wall of plaintiffs, and built a chimney in and upon the same wall, and thereby obstructed the same, and disturbed plaintiff in the use and enjoyment of same.

Second count, for carrying off and converting goods, to wit, bricks and coping stones.

Third count, for erecting a chimney near a house of plaintiffs, causing smoke to issue, and rendering the air unwholesome.

Pleas. 1. Not guilty.

2. To first count: denial of the possession of the wall by plaintiffs.

3. To second count: denial of the possession of the goods by plaintiffs.

Issue on all the pleas.

On the trial before Channell, B., at the last Assizes for Sussex, it

(a) The Court of Queen's Bench sat in banc on June 13th, 15th, 16th, 17th, 23d, 24th, 25th, and 26th, and, for the purpose only of delivering judgments, on July 4th.

appeared that the plaintiffs and defendant severally occupied pieces of ground, which were divided one from the other by a wall. There had been for many years a cowshed or stable on the ground of the defendant, the roof of which rested on the wall, and, according to some of the evidence, occupied the whole width of the top of the wall so far as it was contiguous thereto. In 1855 the defendant took off some coping stones which were on the top of the wall, raised the wall higher, and replaced the coping stones, though not exactly in the corresponding places on the wall. He also erected, where the cowshed had stood, a wash-house, the roof of which occupied the whole width of the wall along the wash-house; and he let into the wall a stone on which was inscribed: "This wall, and the ground on which it stands, belongs to Mr. Smith, 1856." Evidence was given as to the property in the wall. The learned Judge *3] desired the jury to say to whom the wall belonged: and, they having found that the owners of the land on either side had a common property in the wall, he directed a verdict for the defendant on the first and second counts, being of opinion that there was no evidence of an actual ouster, or of a destruction of the wall or of the materials thereof. The case of the plaintiffs on the third count failed. Verdict for defendant.

In last Easter Term, *M. Chambers* obtained a rule nisi for a new trial, on the ground: 1st. That the verdict was against evidence; 2. That the learned Judge misdirected the jury in telling them to find for the defendant if they thought the wall was a party-wall or a wall of which the plaintiffs and defendant were tenants in common; 3. That the learned Judge ought to have told the jury that, even if plaintiffs and defendant were tenants in common, there was evidence of an ouster, or expulsion, or exclusion, by the defendant of the plaintiffs from the wall, which, if the jury found such ouster, expulsion, or exclusion, would entitle the plaintiff to a verdict; 4. That the Judge ought to have told the jury that, for the removal of the coping stones or bricks from the top of the wall, the defendant was liable in this action.

Shee, Serjt., and *C. Pollock*, now showed cause.—Assuming that, as the jury have found, the parties had a common property in the wall, there was no evidence of a trespass or conversion. There was no expulsion or destruction; and one of these is essential to constitute a trespass upon property of which the alleged trespasser is tenant in common. *4] The rule was obtained on the *authority of *Wilkinson v. Haygarth*, 12 Q. B. 837 (E. C. L. R. vol. 64), and *Murray v. Hall*, 7 C. B. 441 (E. C. L. R. vol. 62). Now in *Wilkinson v. Haygarth* the record showed an actual destruction, a digging up and carrying away of the turf, peat, and soil. In *Murray v. Hall* an actual expulsion was proved. Here all that appears is that the defendant, at a part of the wall where there had previously been a stable, raised the wall, removing, for that purpose, and afterwards replacing, the coping stones, and, on the wall so raised, made the roof of a new building to rest, occupying, it is true, the whole width of the wall: but it does not appear that more was occupied than was previously occupied by the roof of the old stable. [Lord CAMPBELL, C. J.—Suppose there are two tenants in common of a wall, and one of them pulls it down and afterwards rebuilds it.] If the wall were entirely destroyed, that might constitute a trespass, though afterwards the party pulling it down determined to rebuild it, and did so: but a reasonable alteration might be made without a trespass. But

in *Cubitt v. Porter*, 8 B. & C. 257 (E. C. L. R. vol. 15), it was held that, if a tenant in common of a wall pulls it down, with the intention of rebuilding it, that is not a trespass, though it is rebuilt to a height greater than the original height. In that case *Littledale, J.*, refers to *Com. Dig. Estates* (K. 8), which collects the instances in which one tenant in common may sue another, principally from *Littleton*, sect. 323, and *Co. Lit.* 199 b, 200 a, 200 b. Such are the destruction of the doves in a dove-house, whereby the flight of doves is wholly lost; the destruction of all the deer in a park; the carrying away of mete stones; the disturbance of the erection of hurdles of a folding. Now here it is plain from the decision in [*5 *Cubitt v. Porter*, that it was neither trespass nor conversion to heighten the wall, and remove and replace the coping stones for that purpose. It was urged that the act done was a trespass because the defendant placed in the wall a stone on which was an inscription asserting that the wall belonged to him. That could go no further than a claim by defendant. [Lord CAMPBELL, C. J.—You say that words or threats are not enough to make a trespass.] Yes: it is not a question of slander of title, but of trespass by entry. As to the conversion, the mere asportation of a chattel does not amount to a conversion unless there be an intention to change the possession, or a destruction of the chattel, or a change in its quality: *Fouldes v. Willoughby*, 8 M. & W. 540,† *Houghton v. Butler*, 4 T. R. 364.

M. Chambers, contra.—In *Cubitt v. Porter*, *Bayley, J.*, founds his judgment on the circumstance that the defendant intended only an improvement of the common property. But here the intention was to obtain the exclusive possession of the wall; the character of the act is shown by the inscription placed on the stone. It is unimportant whether this would formerly have been the subject of an action in trespass or on the case. Had the plaintiffs not resisted, the defendant would in twenty years have acquired an indefeasible title to the wall in severalty. It appears from *Co. Lit.* 200 b, as cited on the other side, that a tenant in common is liable in trespass *vi et armis* for removing mete stones; that is very analogous to the present case: this is like putting *on a [*6 new mete stone. [ERLE, J.—His saying that the wall is his is [*6 scarcely enough.] But his act, accompanied by the assertion, is an ouster. [CROMPTON, J.—He does not merely heighten the wall: he puts a wash-house upon it: that seems an ouster unless the wash-house becomes common property. ERLE, J., referred to *Murly v. M'Dermott*, 8 A. & E 138 (E. C. L. R. vol. 35).] The whole of the wash-house would belong to the defendant: and, as the roof occupied the whole width of the wall, and was not simply built against it on the defendant's side (like the cottage in *Cubitt v. Porter*, 8 B. & C. 257 (E. C. L. R. vol. 15), there was an actual ouster without taking into consideration the inscription. [CROMPTON, J.—You certainly had no longer the use of the same wall; you could not put flower pots on it, for instance. Suppose he had covered it with broken glass, so as to prevent your passing along it, as you were entitled to do.] He was not even entitled to cover half the wall with the building, because that prevented the plaintiffs from possessing the whole. [ERLE, J.—You can take the roof off.] In cases of a trespass the party trespassed upon ordinarily has some such remedy in his own hands: but that does not prevent the injury from being a trespass.

Lord CAMPBELL, C. J.—The learned Judge appears to have told the

jury that, if the wall was common property, there was no evidence of ouster. I think there was evidence on which the jury might have found an ouster. It is allowed that one tenant in common may maintain trespass for an actual ouster. Here the wall was pulled down, and not *7] rebuilt except as a *side of the defendant's wash-house. The identity is gone.

(COLERIDGE, J., had left the Court.)

ERLE, J., concurred.

CROMPTON, J.—The question is, whether there was any evidence of such an ouster as would sustain an action of trespass by one tenant in common against another. Although a tenant in common of a wall may, without subjecting himself to such an action, take down a wall with the intent to rebuild, it must be with that intention. Here the same thing does not remain. There was some evidence on which the jury might say that the coping stones were not restored to their original place. And the plaintiff is excluded from the top of the wall: he might have wished to train fruit trees there, or to amuse himself by running along the top of the wall. Rule absolute.

Trespass *quare clausum fregit* will lie by one tenant in common against his co-tenant, in case of an actual ouster or destruction of the common property, by the latter: *Erwin v. Olmsted*, 6 Cowen 229; *McGill v. Ash*, 7 Barr 397; *Maddox v. Goddard*, 18 Maine 218; see *Allen v. Carter*, 8 Pick. 175; *Keay v. Goodwin*, 16 Mass. 1; but *contra*, *Anders v. Meredith*, 4 Dev. & Batt. 199; *Jones v. Chiles*, 8 Dana 163.

As a general rule, in the absence of any statutory provision or express agreement, the owners of a party-wall are not tenants in common, but hold their respective proportions in severalty: *Matts v. Hawkins*, 5 Taunt. 20; *Sherred v. Cisco*, 4 Sandf. S. C. 480; see *Campbell v. Mesier*, 4 Johns. Ch. 334; 6 Id. 21. Under the statute in

Pennsylvania it would seem that the first builder is the absolute owner of the whole wall, in the first instance, with an easement of support from the adjoining land, and a right to compensation for the use of the wall thereafter: *Roberts v. Bye*, 30 Penn. St. 375.

Where there is no legislative provision on the subject, one of the owners of a party-wall has the right to take it down for the purpose of rebuilding it, when it becomes so ruinous as to be unfit for occupation: *Partridge v. Gilbert*, 15 N. Y. 601; 3 Duer 184; but whether he may do so for his mere convenience is doubtful: *Id.* See *Eno v. Del Vecchio*, 4 Duer 53; *Campbell v. Mesier*, 4 Johns. Ch. 334; 6 Id. 21.

IN THE EXCHEQUER CHAMBER.

BOWMAN v. BLYTH. June 15.

This case is reported, 7 E. & B. 47 (E. C. L. R. vol. 90).

IN THE EXCHEQUER CHAMBER.

KNOWLES *v.* TRAFFORD and KENNEDY. *June 15.*

This case is reported, 7 E. & B. 152 (E. C. L. R. vol. 90).

*IN THE EXCHEQUER CHAMBER.

[*8

INGRAM *v.* BARNES. *June 16.*

This case is reported, 7 E. & B. 132 (E. C. L. R. vol. 90).

JACKSON *v.* COURTENAY, Clerk, and HUDSON. *June 16.*

Under stat. 23 G. 3, c. 10, and stat. 30 G. 3, c. 69, a chapel became vested in trustees to be used as a chapel of ease to the parish church; and, in 1843, defendant and plaintiff were respectively appointed, by the vicar of the parish, minister and clerk of such chapel. By an order in council, made in 1854, under stat. 59 G. 3, c. 134, s. 16, and stat. 2 & 3 Vict. c. 49, s. 3 (Church Building Acts), a district was assigned to the chapel so as to form a district chapelry. By stat. 59 G. 3, c. 134, s. 29, the clerk in every church and chapel erected, built, or acquired or appropriated under the provisions of that Act, or of stat. 58 G. 3, c. 45, shall be annually appointed by the minister of the church or chapel. By stat. 8 & 9 Vict. c. 70, s. 17, the church of any district chapelry shall be a perpetual curacy and benefice; and the minister shall be a perpetual curate, and shall not be in anywise subject to the control or interference of the rector of the parish. The plaintiff never received any appointment as clerk from the defendant, but continued to act as clerk without interruption until 18th August, 1855, when he received from the defendant a notice to quit on the 26th instant. On 26th September, 1855, the plaintiff went to the vestry of the chapel to perform his duties as clerk, when the defendant ordered him to leave, and, on his refusal, had him turned out of the vestry room.

Held, in answer to questions raised by an arbitrator upon the reference of an action by the plaintiff for an assault, that the office of clerk was an annual appointment in the power of the defendant as minister of the chapel, and that the continuance of the plaintiff in the office in successive years without an express reappointment should be construed to amount to a reappointment in each year.

Held, further, that the appointment of clerk was an office; and that the defendant had no power to dismiss from the office during the year of office without cause: and that therefore the notice to the plaintiff to leave in August, there being no evidence when the year of office began, did not remove the plaintiff.

Held, further, that the possession of the vestry room was in the defendant as minister, so as to make the entry and remaining of the plaintiff, the clerk, therein after a prohibition by the defendant a wrong which justified the defendants in removing the plaintiff, and entitled the defendants to judgment upon a plea alleging such facts by way of justification.

THIS case was tried before Lord Campbell, C. J., at the Sittings at Westminster after Michaelmas Term, 1856; when, by consent of the parties, a verdict was entered for the plaintiff for the amount in the declaration *claimed; but subject to the award or certificate of an arbitrator, with power to him to raise in his award any point of law [*9 which either party might desire. The arbitrator awarded that the verdict entered for the plaintiff should stand, but that the entry of damages should be reduced to 6*l.*; and subject, as to the finding on the second issue, to the opinion of the Court on questions raised by the award. And, for the purpose of raising certain points of law for the opinion of the Court with regard to the said finding on the said issue,

the arbitrator found that the action was commenced on the 4th of October, 1855, and that the pleadings in the said action, so far as they were material for the decision of the questions to be submitted to the Court, were as follows.

Declaration: that the plaintiff, Henry William Jackson, sues the defendants, the Rev. Anthony Lefroy Courtenay and Charles Hudson, for that the defendants assaulted and beat the plaintiff, and pulled and dragged him out of a public chapel and place of worship, and gave into the custody of a policeman. Damages 50*l*. Second plea: as to assaulting and beating the plaintiff, and pulling and dragging him and giving him into the custody of a policeman; that, before and at the said times when, &c., and during all the period of time referred to in this plea, the defendant, the Rev. A. L. Courtenay, was lawfully possessed of a certain vestry room; and the plaintiff had, shortly before the said time when, &c., wrongfully entered the said vestry room, and then wrongfully continued in the said vestry room against the will of the defendant Courtenay, although the plaintiff had been theretofore prohibited by the defendant, Courtenay, from so entering or being in the same: and, because the plaintiff wilfully persisted in remaining in the said vestry room against, as *10] the plaintiff then well knew, the will of the defendant *Courtenay, and contrary, as the plaintiff also then well knew, to the said prohibition, and because the plaintiff refused to quit the said vestry room, being then requested by the defendant Courtenay so to do, he, the defendant Courtenay, and the defendant Hudson as his servant and by his authority, gently laid their hands, &c.; and, because the plaintiff still refused, &c., and resisted, &c., in breach of the peace, the defendant Courtenay, and the defendant Hudson as his servant, &c., requested a policeman, &c., and the said policeman did, &c., using no unnecessary violence, &c. Issue thereon. Secondly: for a second replication to the second plea; that, at the said time when, &c., plaintiff was clerk of the said chapel, and had lawfully entered into and was lawfully in the said vestry room as such clerk for the purpose of preparing the things necessary for divine service, which was then about to commence, and of attending such service as such clerk and as one of the congregation; and that the attendance and presence of the plaintiff in the said vestry room was on the said occasion necessary, lawful, and usual, and was his duty as such clerk. Issue thereon.

The vestry room referred to in the pleadings adjoins the chapel of St. James, Pentonville; and both are situate in the parish of St. James, Clerkenwell. The church of St. James, Clerkenwell, was built under the power contained in stat. 28 G. 3, c. 10, intituled "An Act for pulling down the church of St. James, at Clerkenwell, in the county of Middlesex, and for building a new church, and making a new church-yard, or cemetery, in the said parish, with convenient avenues and passages thereto;" and the chapel of St. James, Pentonville, is the chapel of ease *11] referred to in stat. 30 G. 3, c. 69, intituled, "An act for *amending and enlarging the powers of, and rendering more effectual, an Act," &c. (stat. 28 G. 3, c. 10); "and for purchasing Pentonville chapel, and making the same a chapel of ease to the said church." The same chapel was also referred to in an order in council, dated the 7th of April, 1854, and published in the London Gazette of the 25th of April, 1854, and therein described as "The Consecrated Chapel of St. James situate

at Pentonville in the said parish of St. James, Clerkenwell." The above statutes and order in council are to be taken as a part of the case.(a)

The advowson of St. James, Clerkenwell, is in the parishioners at large; but the consent of the parishioners was not given towards obtaining the order in council above referred to. In 1843, the Rev. W. E. L. Faulkner was the minister of St. James, Clerkenwell; and he, in that year, appointed the plaintiff to the office of clerk and sexton at St. James's Chapel, Pentonville. The plaintiff received from the Rev. W. E. L. Faulkner an annual salary of eight guineas; and he also received certain fees payable to him as clerk and sexton. The plaintiff acted as clerk and sexton, without interruption from any person, from the date of his appointment in 1843 down to the 9th of September, 1855. In the month of April, 1854, when the order in council above referred to was made, the Rev. A. L. Courtenay, one of the defendants, was acting as curate to the Rev. W. E. L. Faulkner, the minister of St. James, Clerkenwell, and was discharging all the duties connected with the office of minister of the chapel of St. James, Pentonville. When the order in council was promulgated, the plaintiff, without receiving any new *or [*12 formal appointment, but with the sanction of the defendant, the Rev. A. L. Courtenay, continued to discharge his said duties as clerk and sexton in the said chapel of St. James, Pentonville, as he had done for several years previously; the defendant, the Rev. A. L. Courtenay, undertaking to pay, and paying, the plaintiff his accustomed salary of eight guineas per annum. This state of things continued till towards the end of the year 1854, or the beginning of the year 1855, when some differences arose between the plaintiff and the defendant Courtenay as to the amount of salary which the defendant Courtenay should pay the plaintiff. These differences remaining unsettled, the defendant Courtenay, on or about the 18th of August, 1855, caused the plaintiff to be served with a notice, of which the following is a copy: "Sir, I am requested by the Rev. A. L. Courtenay to apprise you that he does not intend to appoint a clerk to the new parish of St. James, Pentonville, and that the temporary services you are performing will be dispensed with after the 26th instant. I remain, Sir, your obedient servant, Joseph Kimber. Dated August 18th, 1855." On the 9th of September, 1855, by the direction of the defendant Courtenay, the plaintiff was prevented from entering the clerk's desk. The plaintiff from that time made no further attempt to enter the clerk's desk; but, alleging that his appointment as clerk and sexton had not been legally revoked, he, the plaintiff, refused to give up the keys of the chapel, vestry room, wardrobes and cupboard containing the books of the chapel, when requested so to do by the defendant Courtenay. The plaintiff also continued to attend in the chapel and vestry room as usual, and to discharge his accustomed duties as clerk and sexton, so far as the defendant Courtenay would allow him. The *defendant [*13 Courtenay, however, frequently told the plaintiff he was not wanted in the vestry room, and requested him to leave; but the plaintiff on each occasion refused to do so, and remained. On the evening of Wednesday, the 26th of September, 1855, the plaintiff unlocked the chapel and vestry room, and got ready the robes and books for the officiating minister preparatory to the solemnization of divine service, as he had been used

(a) The case did not set them out: the material parts will be collected from the argument.

to do up to that time, and was still in the vestry room waiting to discharge his accustomed duties in the vestry, when the defendants Courtenay and Hudson entered. The defendant Courtenay then laid both his hands upon the plaintiff and endeavoured to remove him; and, having called the other defendant, Hudson, to his assistance, both defendants laid hold of the plaintiff and endeavoured to put him out; but the plaintiff resisted, and they failed in the attempt. The defendant Courtenay then sent for a policeman, and directed him to remove the plaintiff; which the policeman did in obedience to such order, but using no unnecessary force. No charge of impropriety or misconduct in his office had been made against the plaintiff by the defendants, or either of them, or by any other person except in connexion with his, the plaintiff's persistence in coming into the vestry room and refusing to leave it when ordered by the defendant Courtenay.

The following questions were submitted for the opinion of the court. First, whether the plaintiff's tenure of the clerkship of St. James's Chapel, Pentonville, had been duly determined before the 26th of September, 1855. Secondly, whether, even if the plaintiff was, on the day in question, clerk of the said chapel, he was justified in remaining *14] in the vestry after being ordered by the *defendants to quit it. If the court should be of opinion, on the facts above stated, that, under the Church Building Acts and the Acts and order in council above referred to, the defendant, the Rev. A. L. Courtenay, was, on the 26th of September, 1855, lawfully possessed of the said vestry room, and that the plaintiff had been lawfully removed from his said office of clerk and sexton, and that on the day aforesaid he unlawfully entered and unlawfully remained in the said vestry room, then and in that case the arbitrator awarded and adjudged that the verdict entered for the plaintiff on the second issue should be set aside, and that, instead thereof, the verdict on that issue should be entered for the defendants.

The case was now argued. (a)

Knowles, for the plaintiff.—The plaintiff was clerk on the 26th of September, 1855. In order to establish that proposition it is necessary to trace and determine the legal condition of Pentonville chapel. By stat. 28 G. 3, c. 10, certain persons were appointed trustees to rebuild the parish church of St. James, Clerkenwell. By stat. 30 G. 3, c. 69, those trustees were empowered to purchase Pentonville chapel, and make it a chapel of ease to the parish church. By sect. 9 of the latter Act, the minister of the parish for the time being was to nominate the minister, clerk and organist, &c., of the chapel. Under those Acts the chapel was made a chapel of ease; the defendant, Mr. Courtenay, was appointed minister of it; and the plaintiff was appointed the clerk and sexton. From the nature of the office, the plaintiff then acquired a *15] freehold tenure of it. He was therefore appointed to a *freehold office by the minister of the parish of St. James, Clerkenwell, subject to be removed for ill conduct. Afterwards, in April 1854, by an order in council, a district was assigned to Pentonville chapel; and such district was made into a district chapelry. The question is, whether the then existing rights of the plaintiff were thereby altered. It will be said that they were so by the operation of the Church Build-

ing Acts. By stat. 58 G. 3, c. 45, s. 16, parishes may, under certain circumstances, be by order in council divided into distinct and separate parishes for all ecclesiastical purposes. By sect. 21, they may be divided into ecclesiastical districts; or there may be built in any parish by the church building Commissioners, without any division of the parish, any additional chapel to be served by a curate as a chapel of ease. By sect. 22, the several new parishes created by any such complete division as aforesaid, and also the several districts of any parish where any such division thereof shall have been made as aforesaid, shall be ascertained by bounds. By sect. 24, such districts shall thereupon become and be called district parishes, and shall become and be separate and distinct district parishes. By sect. 25, every church and chapel, built or acquired under the provisions of the Act, and appropriated to any such district parish, shall be deemed a perpetual curacy. So that, under that Act, parishes might be divided into separate and distinct parishes, and into district parishes. By stat. 59 G. 3, c. 134, s. 6, certain parts of parishes might, under certain circumstances, be consolidated into a separate and distinct district for all ecclesiastical purposes; such district to be called a consolidated chapelry. By sect. 12, such district, after the termination of the then existing incumbency of the parish, was to become a distinct benefice. By *sect. 16, the Commissioners were empowered to assign a particular district [*16 to any chapel of ease or parochial chapel already existing, or to any chapel built or to be built under the powers of the Acts; and such district should be under the immediate care of the curate appointed to serve such chapel, but subject nevertheless to the superintendence and control of the incumbent of the parish church; and no such chapelry should become a benefice by reason of any augmentation, &c. Under that Act, therefore, there might be another separate division of a parish, called a consolidated chapelry; and there might be, under sect. 16, without any legal division of a parish, a district of it put under the immediate care of the curate of a chapel of ease, which might be called a district chapelry. By stat. 2 & 3 Vict. c. 49, s. 1, the provisions in sect. 16 of stat. 59 G. 3, c. 134, as to the augmentation of such chapelry as is therein mentioned, are repealed. By sect. 2, in the case of any church or chapel which had already been or might be augmented, and for or to which any district chapelry had already been or might be assigned under the Church Building Acts, such church or chapel, from and after such augmentation and the assignment of such district chapelry, should be and was declared to be a perpetual curacy and benefice, and the minister a perpetual curate; and it was enacted that such perpetual curate should thenceforth within such district have sole and exclusive cure of souls, and should not be in anywise subject to the control or interference of the rector of the parish. By sect. 8, the Commissioners for building new churches were empowered to assign a district chapelry to any church or chapel: and the governors of Queen Anne's bounty were empowered to augment such church or chapel. By stat. 8 & 9 Vict. *c. 70, s. 17, the church of any district chapelry, [*17 formed or to be formed under the previous church building statutes, although such church might not have been augmented, should be and was declared to be a perpetual curacy and benefice, and the minister a perpetual curate: and it was enacted that such perpetual curate should

have within and over such district chapelry sole and exclusive cure of souls, and should not be in anywise subject to the control or interference of the minister of the parish. Under that Act, it would seem that another division of a parish may be made, which may be called a district chapelry. The Pentonville chapel and its district may be such a district chapelry; and Mr. Courtenay may be a perpetual curate; yet the rights of the plaintiff may not have been altered. There is no provision in any of the Acts which have been cited as to the status of the clerk, save in sect. 29 of stat. 59 G. 3, c. 134, which enacts that the clerk in every church and chapel erected, built, or acquired, or appropriated under the provisions of the therein recited Act (stat. 58 G. 3, c. 45), or that Act, shall be annually appointed by the minister of the church or chapel. That is inapplicable to the plaintiff, because Pentonville chapel was not erected, built or acquired, or appropriated, under either Act, but had been appropriated before the passing of either Act under stat. 30 G. 3, c. 69. The plaintiff therefore held a freehold office; and no one could legally dismiss him but for ill conduct, which has never been alleged against him. But, if the office was an annual office, and liable to be put an end to by notice, such notice could be given only by the minister of the parish. He appointed the plaintiff; and the right *18] of appointment and dismissal continued to be in him. In *Regina v. Ossett*, 16 Q. B. 975 (E. C. L. R. vol. 71), the question was, whether a pauper had gained a settlement by serving the office of clerk. He had acted as clerk to a church with a district attached under the statutes which have been quoted. He was appointed by the minister of the district church without objection by the vicar of the parish. It was held that he was properly appointed; because the vicar must be taken to have ratified the appointment made by the minister. But it was distinctly held, by Erle, J., "that the pauper was appointed to it" (the office) "by a person who had no right to appoint; but the fact of the vicar, who had the right, not making any ultimate objection must be considered as amounting to a ratification." [ERLE, J.—Stat. 8 & 9 Vict. c. 70, s. 17, was not cited. The judgment seems to have proceeded on consideration of stat. 59 G. 3, c. 134, s. 12, alone.] If the office was only annual, and Mr. Courtenay had the right of dismissal, it is not shown that he duly exercised such right; and it lay on the defendants to show that it was duly exercised. The notice should end with the year of the service. The defendants were bound to show, but gave no evidence to show, when that time was. If the plaintiff was still clerk on the 26th of September, 1855, he was lawfully in the vestry room and entitled to remain there for the purpose of fulfilling the duties of his office. The minister has no exclusive right of possession of the vestry room as against the clerk. The property in the vestry room is not in the minister; and, as to the possession in fact in this case, it is found that the clerk was possessed of the keys of the vestry. [ERLE, J.—The freehold in the church-yard is generally in the rector. Does not *19] that carry the right to the freehold in the vestry?] If that be so, the freehold in this case was in the trustees. But the property in the vestry room would seem rather to be in the overseers. It is not necessarily in the church-yard. It is a room in which the parishioners are entitled to meet in vestry. [ERLE, J.—That is its secondary use. The primary meaning of the term "vestry" is, the place in which the

minister puts on his vestments.] The name is said to be taken from the fact that the priest's vestments were kept there; Burn's Ecclesiastical Law, tit. *Vestry*, I (vol. 1, p. 415 e, 9th ed.). But that derivation of the name does not indicate in whom is the right of possession. In the present case the clerk kept the key; which was evidence of the actual possession being held by him. [CROMPTON, J.—If the clerk keeps the key for the purpose of assisting the minister to put on his vestments, he keeps it rather as the servant of the minister than as exercising a right of possession in himself.] It lies upon the defendants to show that the minister had an exclusive right of possession as against the clerk.

Sumner, for the defendants, was desired to confine himself to the point whether the power of dismissal had been exercised at the proper time.—Assuming the other questions to be determined in favour of the defendants, the question whether the plaintiff was rightly or wrongly dismissed is in this case immaterial. If he was dismissed in fact, his service as clerk was at an end, and the defendants are entitled to succeed. For a wrongful dismissal, if it was such, the plaintiff should have sued in another form of action. [CROMPTON, J.—You cannot treat this as a case of master and servant. It was held, *in *Regina v. Ossett*, 16 Q. B. 975 (E. C. L. R. vol. 71), that the service of a [*20 clerk is in its nature an office.] If the plaintiff was not in fact clerk, he had no colour of right to remain in the vestry room. If he was in fact dismissed from his office, he was no longer clerk. If he was wrongly dismissed, there is a remedy.

Cur. adv. vult.

ERLE, J., in this Vacation (July 4th), delivered the judgment of the Court.

Upon the facts found by the arbitrator, we are of opinion that the power of annual appointment to the office of clerk in this district is in the defendant under stat. 59 G. 3, c. 134, s. 29, and that the continuance of the plaintiff in the office in successive years, without an express reappointment, would be construed to amount to reappointment in each year. In *Regina v. Ossett*, 16 Q. B. 975 (E. C. L. R. vol. 71), the point for decision was the validity of the appointment to the office of clerk. The counsel, impeaching the validity, contended that the power was in the rector, and not in the minister of the chapel; and the Court say that, if it is in the rector, he has ratified the appointment by the minister of the chapel. The words expressing that the power was in the rector ought not to be taken as deciding the point between the rector and the minister of the chapel, but as deciding the point above mentioned then before the Court, and no more. We are further of opinion that the defendant has no power to dismiss from the office during the year of office without cause, and that therefore the notice to leave, sent in August, did not *remove the plaintiff from the office [*21 in the following September when the cause of action arose, there being no ground for assuming that the year of office began at either of those periods. We are further of opinion that the possession of the vestry room was in the defendant, so as to make the entry and remaining of the plaintiff after a prohibition of the defendant a wrong which justified the defendant in the removal to which the second plea is pleaded. The defendant is therefore entitled to succeed on that plea; and we send back the award to the arbitrator to give effect to our judgment on these points. The event of the action is therefore in

favour of the defendant; and the power of annual appointment to the office of clerk is in the defendant; and thus the most important among the matters in difference are in favour of the defendant. The point in favour of the plaintiff is, that he continued in office when the cause of action arose.

Judgment accordingly.(a)

(a) Reported by W. B. Brett, Esq.

*22] *IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

Sir HENRY PAUL SEALE, Bart., v. The QUEEN. *June 16.*

The mayor and assessors, at the revision of the burgess lists for a borough, erroneously treated the burgess list de facto made out for one of the parishes as a nullity. They then made out a fresh burgess list for that parish, and inserted on it the name of a person in the original parish burgess list who proved his title to their satisfaction; and the name thus inserted was transferred to the burgess roll.

Held, in the Court of Exchequer Chamber, upon error on a bill of exceptions, that such person, though qualified in all respects to be on the burgess list, acquired by the act of the mayor and assessors no title to be a burgess.

ERROR on a judgment of the Queen's Bench, on an information in the nature of quo warranto, against the now plaintiff in error, and on a bill of exceptions.

The count recited that Clifton Dartmouth Hardness is one of the boroughs named in Schedule (A.) to stat. 5 & 6 W. 4, c. 76, and charged the defendant with being improperly placed on the burgess roll of that borough, made in the year 1853, and with usurping the office of burgess.

Plea: averring in detail the defendant's qualification (as a male person of full age, occupying a house in the parish of Townstall, in the said borough, and an inhabitant householder residing there, and having paid all rates) to be placed on the burgess lists. That the overseers of three parishes (which together with the parish of Townstall formed the borough of Dartmouth) duly made out burgess lists for their respective parishes, and delivered them to the town clerk, and copies of these lists were duly
*23] affixed on the door of the town *hall. That, defendant's name not being in these lists, nor in any burgess list for the parish of Townstall, "made out according to the form No. 1, in Schedule (D.)" to the Act, he gave notice of his claim to have his name inserted; and divers other persons did the same; and a list of claimants was made out. That, the defendant (below) being mayor, the assessors held their court for revising the lists. That there had not been nor was any burgess list for that year for the parish of Townstall "made out according to the form No. 1, in the said Schedule (D.)" to the Act, delivered to the town clerk, or produced to the mayor and assessors. And, because defendant and others claimed to be, and after inquiry were proved to the satisfaction of the mayor and assessors to be entitled to be, on the burgess list for Townstall, the mayor and assessors made a burgess list for Townstall, and inserted defendant's name in it, whence it was transferred to the burgess roll; and by that title he claimed.

Replications: traversing respectively the averments that no burgess list of Townstall was made, and that no burgess list was produced to the mayor and assessors. Verdict for the Crown; and judgment of ouster.

From the bill of exceptions it appeared that, on the trial before Coleridge, J., it was proved that a list signed by the overseers of Townstall was made out and delivered, and that, if it was in proper form, all other matters were regular. It was headed:

"Borough of Clifton Dartmouth Hardness. List of the burgesses for the parish of Townstall entitled to vote in the election of councillors for the said borough, 1853." And the third column was headed: "Street, Lane, or other place in the borough where the property is situated for which he is now rated." In the body of the list each *of these places was described as being in Townstall: e. g. the [24 defendant's own name was inserted as entitled in respect of "house, Mount Boon, Townstall." The defendant, as mayor, and the assessors had treated this list as a nullity, because of these formal deviations from the form in Schedule (D). The learned judge directed the jury that the list was sufficient. The exceptions were to this ruling.

Butt now (a) argued for the plaintiff in error, defendant below.—Probably the exceptions cannot be maintained: but on the whole record it appears that the plaintiff in error had a good title; and therefore the judgment ought to be in his favour, non obstante veredicto. [CRESSWELL, J.—Even if there were a good title, it is not confessed on this record; a traverse is an admission of the rest of the pleading, conditional on the traverse being found against the traverser. Here it is found for him, and therefore is no admission. WILLES, J.—There might be a confession on other pleadings to justify a judgment non obstante veredicto; but here there are no other pleadings.] It may be that the judgment should not be for the plaintiff in error non obstante veredicto, but that it should be for a repleader. It appears on the record that the plaintiff in error had a complete title to be on the burgess roll; if the mayor and assessors had not put him there, he might have had a mandamus to have his name inserted: *Regina v. The Mayor of Litchfield*, 1 Q. B. 453 (E. C. L. R. vol. 41). He ought not to be worse off because not *rejected. [CRESSWELL, J.—The question raised therefore [25 is, whether there is another legitimate way of getting on the burgess roll besides the burgess list, under the provisions of stat. 5 & 6 W. 4, c. 76, and a mandamus under stat. 7 W. 4 & 1 Vict. c. 78, s. 24.]

Kinglake, Serjt., contrà.—It may be that the plaintiff in error was in such a position that he could have got on the burgess roll in a legitimate mode; but that mode was not adopted. The mayor and assessors took on themselves to frame a burgess list of their own, and place on it only the names of the claimants, thereby disfranchising all who were on the true burgess list, and who therefore had made, and needed to make, no claim. For this there is no statutable authority. The remedy by mandamus under stat. 7 W. 4 & 1 Vict. c. 78, does not apply to such a case, being applicable only where names are rejected: but, if it does, it has not been sought.

Butt was heard in reply.

(a) On this day, before Cockburn, C. J., Cresswell, Williams, and Willes, Js., and Bramwell, Watson, and Channell, Bs.; and, on June 17, before Cockburn, C. J., Cresswell, Williams, and Willes, Js., and Martin and Bramwell, Bs.

COCKBURN, C. J.—We are all of opinion that the judgment ought to be affirmed. On looking at the record we find that, at the revision of the burgess lists for Dartmouth, the overseers of the different parishes forming the borough, including those of the parish of Townstall, had sent in lists. The mayor and assessors were of opinion that the list for Townstall was bad; and they treated it as a nullity, and non-existing. The plaintiff in error, being entitled, as on this record we must assume, to be on the burgess list, and treating the entry of his name on what he thought a bad list as an omission of his name altogether, had sent in a claim to *be inserted in the burgess list. The mayor and assessors, *26] having set aside the list actually sent in, and wishing to give effect to the claims, made out of their own proper authority a new list for Townstall; and, treating that as the list, investigated the plaintiff in error's claim, and, having thought it good, inserted it on that list. But the list which the mayor and assessors had treated as a nullity was really valid; and that was the list on which the claimant's name ought to have been inserted. The question is, was the course pursued legal and valid? I am clearly of opinion that it was not. It is enough to look at stat. 5 & 6 W. 4, c. 76, to see that this course is not pursuant to the provisions of that Act. By sect. 15 the overseers of each parish are to make a list of all persons entitled to be enrolled in the burgess roll in respect of property within such parish. The lists so made out are the burgess lists. Then, by sect. 18, the mayor and assessors are to revise the burgess lists; and for that purpose they are to hold a court, of which notice is to be given; and then "the mayor shall insert in such lists the name of every person who shall be proved, to the satisfaction of the court, to be entitled to be inserted therein, according to the provisions of this Act, and shall retain on the said list the names of all persons to whom no objection shall have been duly made, and shall also retain on the said lists the name of every person who shall have been objected to by any person, unless the party so objecting shall appear by himself or by some one on his behalf in support of such objection; and where the name of any person inserted in any one of the said lists shall have been duly objected to, and the person objecting shall appear by himself or by some one in his behalf in support of such objection, the court shall *require proof *27] of the qualification of the person so objected to; and in case the qualification of such person shall not be proved to the satisfaction of the Court, the mayor shall expunge the name of every such person from the said lists, and shall also expunge from the said lists the name of every person who shall be proved to the Court to be dead, and shall correct any mistake, or supply any omission which shall be proved to the Court to have been made in any of the said lists in respect of the name or place of abode of any person who shall be included in any such list, or in respect of the local description of his property: Provided always, that no person's name shall be inserted by the mayor in any such list, or shall be expunged therefrom, except in the case of death, unless notice shall have been given as is hereinbefore required in each of the said cases." So that it appears throughout that it is with the lists sent in by the overseers, and with those alone, that the mayor is to deal. Sect. 19 gives the power to examine witnesses as to the "omission or insertion of any name in any of the said lists." "And the mayor shall, in open court, write his initials against the names respectively struck out or inserted,

and against any part of the said lists in which any mistake shall have been corrected, and shall sign his name to every page of the several lists so settled." The whole of the powers confided to the mayor are to be exercised on the lists sent in, and on those alone; and there is not in the statute the slightest trace of any power either to expunge or insert any name except in those lists. From them, when settled, the burgess roll is (by sect. 22) made up. Then a subsequent statute (7 W. 4 & 1 Vict. c. 78, s. 24) provides that, where any person's "claim shall have been *rejected, or name expunged, at the revision," the Court of Queen's Bench may inquire into his title, and award a mandamus [*28 to the mayor to insert his name, not upon the burgess lists, but upon the burgess roll at once; and add the words, "by order of the Court of Queen's Bench:" and then the person shall be a burgess. So that, by the first Act, the power of the mayor is confined to dealing with the lists from which the roll is made up; by the subsequent Act a power is given, in obedience to the Queen's Bench, to deal in one exceptional case with the burgess roll direct. It is true that in *Regina v. The Mayor of Litchfield*, 1 Q. B. 453 (E. C. L. R. vol. 41), where there had been an entire omission to make a burgess list, the Court of Queen's Bench thought that they had power to deal with the burgess roll direct. That however has no bearing on the present question; for the fact is found that there had been no omission, that the list prepared de facto was a perfect list, and, being so, the mayor, under the statutable directions, clearly was to deal with that list. To make out a new list instead of that, was a clear departure from his statutable duty. His duty and power were confined to dealing with the lists, and not with the roll; and, assuming that there is power in the Court of Queen's Bench in such a case as that of *Regina v. The Mayor of Litchfield* to deal with the roll direct, there is no such case here.

CRESSWELL, J.—I also think that the judgment should be affirmed. Supposing the suggestion well founded, that where no list has been prepared, the mayor and assessors may originate one, it would not touch the *present case; for there was a list which was perfectly valid; [*29 and the mayor and assessors had no right to set it aside and make a new one. By making out such a new list they gave no authority to the town clerk to insert the names in it on the burgess roll; and the plaintiff in error who thus got upon the roll has no title.

WILLIAMS, J.—I also am clearly of opinion that the name of the plaintiff in error was improperly placed upon the roll. The plea sets up a title to be placed on the burgess list, and avers that there was no list. That is traversed; and, had the traverse been found against the Crown, the question would have arisen what was the duty and right of the mayor and assessors in such a case. But, on the trial, it appeared that there was an unexceptionable list. That being so, their duty was clear. To ignore that list and substitute a fresh one was wholly illegal. Then it is argued that the plaintiff in error is entitled to a repleader, as, striking the averment traversed out of the plea, a good bar remains unanswered, though not confessed; and, if that were so, he would be entitled to a repleader. It appears on the plea, that the plaintiff in error made a claim to be on the burgess list, and a good claim, and that, if his claim had been rejected, the Queen's Bench would have put him on the burgess roll. It is not material to inquire whether what

passed was equivalent to a rejection ; for, if the Court of Queen's Bench, under these circumstances, if applied to, could and would have ordered his name to be inserted on the roll, they have not done so : and till they make such an order he is not a burgess.

*30] MARTIN, B.—I concur. This is error on a bill of *exceptions : and the first question is if there was any miscarriage on the part of the judge. The issues were, whether there was a valid list. It is scarcely contended that the ruling of the judge was erroneous ; and it is quite clear that the lists substantially followed the form in the Act, and were unexceptionable. But then it is contended that, though the traverses were properly found for the Crown, the rest of the plea showed a good title. I apprehend that, if this were so, the traverses being found for the Crown are no confession of the rest of the plea ; and therefore there could not be judgment for the defendant below non obstante veredicto. But he would be entitled to a repleader. At one time I thought he was so entitled : but I am now satisfied that the traverse is on a material averment. The information charges the defendant below with being improperly on the burgess roll, and with usurping the office of burgess. The gist of the plea is, that the borough consists of several parishes ; that lists were made for all those parishes save one, the parish of Townstall ; and that the defendant had sent in his claim, which was well founded, to be on the list for that parish of Townstall. Then that at the court of the mayor and assessors, no list for Townstall being produced, the mayor and assessors made one, and, having examined the claim of the defendant below, and being satisfied, placed him on that list. But then it is proved and found upon the record that, instead of no list for Townstall being produced, a good burgess list was produced : and, that being so, a perusal of stat. 5 & 6 W. 4, c. 76, s. 18 is enough to show that the mayor and assessors had no discretion ; their duty was to revise that list ; and they had no authority to put him on any other.

*31] *WILLES, J.—Looking at the statutes, we find two ways by which a person may legally be upon the burgess roll. The first is by being upon the burgess lists after they have been revised by the mayor and assessors ; the other is by mandamus. Here the plea does not disclose either title.

BRAMWELL, B.—If the untraversed part of this plea shows a good title, those who sent in their claims would be better off than those who, being on the list prepared by the overseers, neither claimed nor needed to claim. I should have thought the title defective even if the traverse had been found the other way, and there had been no list at all.

Judgment affirmed.

FRANCES ANN STOKOE and MARY STOKOE v. HEW SINGERS.

Plaintiff was owner of a house in which there were ancient windows. Plaintiff's predecessor blocked them up; and they continued blocked up for nearly twenty years. Defendant purchased the adjoining land, and proposed to build upon it. Plaintiff, by way of asserting the right to the light, reopened his ancient windows. Defendant obstructed them. On the trial of an action for this obstruction, the Judge directed the jury that, if the right to light had once been acquired, it continued unless lost; and he directed them, if they thought the right had once been acquired, to find for the plaintiff, unless they thought his predecessor had, in blocking up the windows, manifested an intention of permanently abandoning his right to the light, or unless they thought that the lights had been kept so closed as to lead the defendant to alter his position in the reasonable belief that the lights had been permanently abandoned. The plaintiff having had a verdict:

Held, that the defendant had no ground to complain of this as a misdirection. *Quære*, Whether the manifestation of an intention to abandon the lights communicated to the owner of the land would destroy the right, until the owner of the land altered his position in reliance thereon.

FIRST count. For that, in a warehouse in the possession of plaintiffs' tenants, the reversion belonging *to plaintiffs, there of right were [*32 and still of right ought to be windows, through which the light and air did enter and still of right ought to enter; and that the defendant obstructed the light and air from entering, by boards. **Second count**, stating the message to be in the possession of the plaintiffs.

Pleas: 1. Not guilty; 2 and 3, to the first and second counts respectively, traverses of the right as alleged.

On the trial, before Martin, B., at the Northumberland Spring Assizes, 1857, it appeared that the warehouse in question was an ancient one in which there were, in 1837, windows, both on the east and west. There was evidence that all these windows were at that time ancient. The windows were secured on the outside by iron bars. In the year 1837, the then owners of the warehouse blocked up the western windows on the inside with rubble and plaster. The bars remained outside, so that, to a spectator from the outside, it was obvious that there had been windows there; it was a matter of controversy at the trial whether to such a spectator it would or would not appear that they had been stopped up from within. It was suggested, for the plaintiffs, that the blocking up of the windows was for a temporary purpose connected with the occupation of the warehouse; and, for the defendant, that it was done with the intention of permanently altering the condition of the warehouse. In this state the windows remained till 1856. The defendant having become owner of the land up to the warehouse on the west side, showed an intention of building upon it in a manner which, if carried out, would have prevented the owners of the warehouse from ever again opening the blocked up windows. The plaintiffs thereupon opened the windows *by way of asserting their right so to do. The defendant, to raise [*33 the question whether they had such a right, erected a hoard on his own land so as to obstruct the windows. This was not twenty years after the first blocking up of the windows. The action was brought against him for this obstruction. The learned Baron left to the jury the question, whether the owners of the warehouse had, in 1837, acquired the right to light and air through these windows: no complaint was made of the manner in which this part of the case was left to the jury. He then told the jury that, assuming that the right had then existed,

the question would arise whether it had ceased. He explained at considerable length that there were various ways in which the right might be lost. He stated that the right might be lost by an abandonment, and that closing the windows with the intention of never opening them again would be an abandonment destroying the right, but that closing them for a mere temporary purpose would not be so. He also stated that, though the person entitled to the right might not really have abandoned it as to induce the owner of the adjoining land to alter his position in the reasonable belief that the right was abandoned, there would be a preclusion as against him from claiming the right. After going through the evidence, he concluded by asking the jury whether they believed that the plaintiffs' predecessor blocked up the windows in 1837 "with the intention of abandoning them for ever and aye;" and told them that, unless he did, the right was not gone: but this Court considered that, on the whole summing up, the jury must have understood that the questions whether there was such a manifestation of an intention to abandon them, and such an acting by the defendant on that as to constitute a preclusion as previously explained, were also left to them. Verdict for plaintiffs.

S. Temple, in the ensuing Term, obtained a rule *Nisi* for a new trial, on the ground of misdirection "in directing the jury to find for the plaintiffs, unless they were satisfied that the lights referred to in the evidence had been closed with the intention of never opening them again."

Unthank, in last Term,^(a) showed cause.—The direction of the learned Judge was perhaps too favourable to the defendant; for it is very questionable if an intention to give up an easement can in law amount to an abandonment of it, unless that intention be manifested to those interested in the servient tenement, and acted on by them. But, the verdict being for the plaintiffs, it is only necessary to inquire whether there was any misdirection in their favour. *Moore v. Rawson*, 3 B. & C. 332 (E. C. L. R. vol. 10), is the case relied on by the other side; but the language of the Judges there must be understood with reference to the facts of that case. There, seventeen years before the action, a shop with ancient windows was pulled down, and in its place a stable built with a blank wall where the windows used to be. About three years before the action, and whilst the premises remained in that state, the defendant erected a building next to the blank wall; and the plaintiff then opened a window in that wall, in the same place where there had formerly been a window in the shop: and the action was brought for the continued obstruction of this new window by the building so previously erected by the defendant. The doctrine as to preclusion has been recently illustrated; and now it requires nothing more than the above statement to show that the defendant in that case had been induced by the plaintiff to believe that the ancient windows were abandoned, and to act on that belief by building on his own premises; and, therefore, that the plaintiff was precluded from asserting his right as against him. And this it will be found is the ratio decidendi of *Abbott, C. J.* He says: "I am of opinion that the plaintiff is not entitled to maintain this action. It

(a) June 16th, 1857. Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, Ja.

appears that many years ago the owner of his premises had the enjoyment of light and air by means of certain windows in a wall of his house. Upon the site of this wall he built a blank wall without any windows. Things continued in this state for seventeen years. The defendant, in the interim, erected a building opposite the plaintiff's blank wall, and then the plaintiff opened a window in that which had continued for so long a period a blank wall without windows, and he now complains that that window is darkened by the buildings which the defendant so erected. It seems to me that, if a person entitled to ancient lights pulls down his house and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain for a considerable period of time, it lies upon him at least to show, that at the time when he so erected the blank wall, and thus apparently abandoned the windows which *gave light and air to the house, that was not a perpetual, [*36 but a temporary abandonment of the enjoyment; and that he intended to resume the enjoyment of those advantages within a reasonable period of time. I think that the burthen of showing that lies on the party who has discontinued the use of the light. By building the blank wall, he may have induced another person to become the purchaser of the adjoining ground for building purposes, and it would be most unjust that he should afterwards prevent such a person from carrying those purposes into effect. For these reasons I am of opinion, that the rule for a nonsuit must be made absolute." [CROMPTON, J.—Abbott, C. J., seems rather to be making a remark on the effect, as evidence, of erecting the blank wall than laying down a rule of law. He says that such a manifestation of an intention to abandon the windows in perpetuity cast upon the party the onus of showing a manifestation to the contrary.] It would seem to be so. [COLERIDGE, J.—Bayley, J., seems, however, to lay down a general rule not followed in the summing up in the present case.] He must be understood as speaking with reference to the facts before him. If he is understood to mean literally that all easements are acquired by enjoyment, and abandoned by non-enjoyment, it is not consistent with later authorities: *Mason v. Hill*, 5 B. & Ad. 1, 16 (E. C. L. R. vol. 27). There it is said that, supposing the right to water to be acquired by occupancy, when once acquired "it could not be lost by mere non-user from 1819 to 1829." [ERLE, J.—The right to the natural flow of water is not an easement, but a natural right, which is not lost until an adverse easement has been acquired. The right *to light is in the nature of a servitude. It is important, [*37 for the decision of this case, to know what destroys that servitude after it has been acquired. In *Moore v. Rawson*, 3 B. & C. 332 (E. C. L. R. vol. 10), it seems to be said that an intention to abandon it permanently destroys it, unless a contrary intention be manifested within a reasonable time, which is not defined. I should feel inclined to say that the intention permanently to abandon it would destroy it as soon as it was communicated to the owners of the servient tenement, without the lapse of any time. Lord CAMPBELL, C. J.—I doubt whether the communication of that intention destroys the right until the communication is acted upon. Then it certainly does.] The cases on the point are not very numerous, and are all to be found in *Gale on Easements*, p. 354, et seq. The right may be lost by the destruction of the dominant tenement, but not merely by pulling it down to rebuild

it. [CROMPTON, J.—That is the basis of the judgment of Holroyd, J., in *Moore v. Rawson*, 3 B. & C. 332 (E. C. L. R. vol. 10). I understand the summing up of the Judge in the present case as leaving it to the jury to say whether there was such a permanent alteration of the warehouse or not.] If there is not either an alteration of the dominant tenement, or preclusion, the servitude, though it may be released, cannot be lost by mere interruption of possession; Co. Litt. 114 b; a release, in modern times, would be inferred by twenty years' disuse, but not from less. *Regina v. Chorley*, 12 Q. B. 515 (E. C. L. R. vol. 64), is no authority to the contrary. [Lord CAMPBELL, C. J.—It is an authority that an abandonment is effectual if communicated and acted upon. It *38] goes no further.] Mere non-user is not *enough: *Ward v. Ward*, 7 Exch. 838.† [CROMPTON, J.—In *Moore v. Rawson*, 3 B. & C. 332 (E. C. L. R. vol. 10), Littledale, J., points out and relies on a distinction between an easement properly the subject of a grant, as a right of way or the like, and a right restricting the owner of land from using it so as to obstruct the light, a right *ut non facias*. If a person, entitled to such a restriction, gives the owner of the land leave to use it, as such owner naturally might, may the owner not so use it?] If the license is acted upon, it may become irrevocable, not otherwise. It is but another way of putting the point as to preclusion.

S. Temple, in support of his rule.—The right to light is founded on an implied consent not to use the land in such a way as to interfere with the ancient windows. It is not reasonable that the consent should be supposed to continue after the windows have been discontinued. [Lord CAMPBELL, C. J.—Do you say the right is gone as soon as the abandonment is known to the owners of the servient tenement, and before they have acted upon it?] Yes: after a reasonable time has elapsed, without any indication of an intention to resume them. [ERLE, J.—What is the definition of a reasonable time for this purpose?] It must be a question of fact in each case, depending upon the circumstances. The right does not arise from any presumption of a lost grant; per Littledale, J., in *Moore v. Rawson*, 3 B. & C. 332 (E. C. L. R. vol. 10); and therefore there is no difficulty arising from the necessity of a release. [CROMPTON, J.—Littledale, J., says the right does not arise by grant, but “more properly arises by a covenant which the law *39] would imply not to interrupt the free use of the *light and air.” Does not that seem as if he thought that, though not the subject of a grant, it was analogous to a right created by deed?] At all events, the defendant has a right to build on his land as if the windows remained as they were at the time when he purchased. [Lord CAMPBELL, C. J.—It may have been a question for the jury whether the defendant was not induced to buy the land, and so alter his position, in the reasonable belief, induced by the plaintiffs, that the windows were permanently abandoned. But, if so, was it not left to the jury?] *Cur. adv. vult.*

ERLE, J., in this Vacation (July 4th), delivered judgment.

We think that in this case the rule for a new trial on the ground of misdirection should be discharged. Taking the whole summing up together, it seems to us that the true points were left by the Judge to the jury, and found for the plaintiffs.

We consider the jury to have found that the plaintiffs' predecessor

did not so close up his lights as to lead the defendant to incur expense or loss on the reasonable belief that they had been permanently abandoned, nor so as to manifest an intention of permanently abandoning the right of using them.

The English doctrine, which establishes the right to light by an uninterrupted user for twenty years, has not been in general adopted in this country, by reason of its inapplicability to our circumstances, especially in the rapid growth of towns: *Parker v. Foote*, 19 Wend. 318; *Ingraham v. Hutchinson*, 2 Conn. 597; *Pierre v. Fernald*, 26 Maine 436; *Myers v. Gemmell*, 10 Barb. 546; *Ray v. Lines*, 10 Ala. 63; see *Napier v. Bulwinkle*, 5 Richardson 405; 3 Kent Com. 446. In other cases, however, it has been recognised and followed: *Robeson v. Pittinger*, 1 Green. Ch. 57; *McCreedy v. Thompson*, 1 Dudley 131; *Gortis v. Grabel*, 16 Illinois 217. In Massachusetts the point has never been actually decided, but in *Fifty Associates v. Tudor*, 6 Gray 255, it was held that the right, if it existed in a city, could only extend to a reasonable distance, so as to give to the tenement entitled to it such an amount of light and air as may be reasonably necessary to its comfortable occupation for purposes of habitation or business.

As to the abandonment of easements by non-user, it is said not to apply where an easement has been created by deed: *Jewett v. Jewett*, 16 Barb. 150; *Smiles v. Hastings*, 24 Id. 49; *White v. Crawford*, 10 Mass. 189; *Angell on Watercourses*, § 252. Yet in *Dyer v. Sandford*, 9 Metcalf 395, it

was laid down that, in such case, the owner of a dominant tenement may make such changes in the use and condition of his estate as to renounce his easement, and this may be relied on by the owner of the servient tenement as an abandonment; but in order to prove such abandonment, it must be shown that the acts relied on were done voluntarily by the owner of the inheritance, who had authority to bind the estate by his grant or release, and were of so decisive and conclusive a character as to prove his intention to abandon the easement. There can be no doubt, however, that the right to lights may be lost by abandonment even for less than twenty years, where the party clearly relinquishes the enjoyment of them, as by building a blank wall to his house: *Manning v. Smith*, 6 Conn. 289. And it is also scarcely open to question that where the party clearly relinquishes the enjoyment of an easement, it lies with him to show an intention to resume the use of it within a reasonable time; and that where there are no circumstances indicating that the suspension is temporary only, a *bonâ fide* purchaser of the servient tenement will be protected in the enjoyment of the property as it appeared at the time of his purchase: *Corning v. Gould*, 16 Wend. 531. The question of abandonment is one for the jury: *Parkins v. Dunham*, 3 Strobb. 224.

*40] *HODSON v. THE OBSERVER LIFE ASSURANCE SOCIETY. *June 23.*

Under stat. 14 G. 3, c. 48, s. 2, in every policy on the life of another, whether a bond fide, or a gaming, or wager, policy, the name of the person interested in such policy must be inserted therein at the time of making, as that of the person interested; otherwise the policy is void.

DECLARATION stated that, by a certain policy of insurance, signed and sealed on behalf of the Society as provided by stat. 7 & 8 Vict. c. 110, after reciting that plaintiff was desirous and had proposed to effect an insurance with the defendants for 1500*l.* on the life of Charlotte Weir for the whole continuance thereof, and had caused to be delivered into the office of the defendants a declaration, &c. (setting out the material parts of a policy in the form used by the Society on the life of Charlotte Weir, for 1500*l.*), and had paid the premium for one year, it was by the said policy witnessed, &c.

Averment: "that the said policy was in fact effected and made for the use and benefit, and on account, of the said Charlotte Weir; whereof the defendants, before and at the time of making of the said policy, had notice:" that the said Charlotte Weir afterwards died: and that all things had been performed and happened to entitle plaintiff to sue for and recover the said 1500*l.* Breach: non-payment.

Fourth plea: "That the name of the said Charlotte Weir was not inserted in the said policy as a person for whose use or benefit or on whose account such policy was made; but the said policy was and is in the words and figures following, that is to say: 'Life of another with *41] profits. Observer Life Assurance Society. Offices, *70, Cheapside, London. Policy, No. 18. Sum assured, 1500*l.* Premium, 42*l.* 2*s.* 6*d.*, payable yearly. Whereas James Hodson, junior, of,' &c., 'alleging himself to be interested in the life of Charlotte Weir, of,' &c., 'is desirous and hath proposed to effect an assurance with The Observer Life Assurance Society in the sum of 1500*l.* upon the life of the said Charlotte Weir for the whole continuance thereof, and hath caused to be delivered into the office of the said Society a declaration,' &c.'" (setting out all the rest of the policy, which contained no other allegation as to who was interested).

Demurrer to this plea. Joinder.

Raymond, for the plaintiff.—The defendants rely on stat. 14 G. 3, c. 48, which provides, by sect. 2, that it shall not be lawful to make any policy on the life of any person, without inserting in such policy the name of the person interested therein, "or for whose use, benefit, or on whose account, such policy is so made." But, first, the facts, as they appear on the record, are perfectly consistent with a policy which would be good at common law; and the Court will not presume illegality. Secondly, the preamble and sect. 1 of the statute show that it is directed only against gaming and wager policies. That was clearly the opinion of the Court of Exchequer in *Dalby v. The India and London Life Assurance Company*, 15 Com. B. 365 (E. C. L. R. vol. 80): and there is nothing on the record to show that this is such a policy. [CROMPTON, J.—The statute, in effect, enacts that, to prevent the mischief arising *42] from gaming or wager policies, all policies on the life of another shall be drawn as provided in sect. 2. COLERIDGE, J.—And in this policy not only is the name of Charlotte Weir not inserted as that of the party interested, but the name of another is put in that charac-

ter.] The declaration avers that Charlotte Weir was the party for whose use and benefit the policy was effected. [CROMPTON, J.—But her name is not in the policy as that of the party interested. The plaintiff might have been the party interested: but then the declaration ought to have so averred. ERLE, J.—Both the plaintiff and Charlotte Weir might have been interested. But then both names ought to have been inserted.] The Court will not hold the policy absolutely void, unless it be a gaming or wagering policy. It is clearly not within the spirit of the Act, and therefore ought not to be held subject to its provisions: 7 Bac. Ab, 457 (7th ed.), tit. *Statute*, I. 5. And there is nothing in the policy inconsistent with its not being even within the letter of the statute. The plaintiff might have insured as trustee for Charlotte Weir. [WIGHTMAN, J.—If the plaintiff insured as trustee, the declaration ought to have shown that fact.] It is for the defendants to show that the policy is within the operation of the statute.

Hayes, Serjt., for the defendants, was not called on.

COLERIDGE, J.—Our judgment is for the defendants. We certainly do not know whether this is or is not a gaming or wager policy; but that is immaterial; sect. 2 of the statute, which is wider in its language than the preamble, assumes that the policies on the life of another with respect to which it provides are made for the interest *of some [*43 person, and enacts that the name of the person so interested shall be inserted in every such policy: inserted, that is, as that of the person interested: and the statute makes no distinction, as regards this provision, between ordinary policies on lives and gaming or wager policies. There is nothing on the record here to show that the name of Charlotte Weir, the person interested in the policy, was so inserted in it; and the plea is therefore good.

WIGHTMAN, J.—I am of the same opinion. The statute makes a wager policy void per se, but proceeds to enact that it shall not be lawful to make *any* policy on the life of another without inserting therein the name of the person interested in the policy. Mr. *Raymond* contends that this provision applies only to gaming and wager policies; but I see nothing in the language of the statute, which is perfectly explicit, affording any ground for such an argument. It is quite clear that the intention of the statute was to enact that all policies, bonâ fide or not, should be drawn in this manner.

ERLE, J.—Sect. 2 requires that the name of the person really interested in the policy shall be inserted in it. Here the plaintiff appears in the policy as the person interested, while the declaration avers that Charlotte Weir was the person interested. If such averment be true, the statute has not been complied with, and the policy is void. The plea, therefore, is good.

CROMPTON, J.—It has been contended that the name of Charlotte Weir, the person interested in the policy, does appear in it. That is so; but it does not appear *there in the manner required by the [*44 statute, viz., as that of the person interested. As to the argument that sect. 2 is intended to apply only to gaming and wager policies, it is clear that the provisions extend to all policies on the life of another. And it is also clear, upon this record, that those provisions have not been complied with.

Judgment for the defendants.(a)

BEAVER v. The Mayor, Aldermen, and Citizens of MANCHESTER.
June 23.

Declaration stated that defendants erected a bridge across a certain canal, part of the bed of which belonged to plaintiff, and also erected certain walls adjoining, and caused the said bridge and walls to be so constructed as to project over parts of the said land of the plaintiff. Plea, that the several acts, matters, and things complained of were lawfully done by defendants under and by virtue of powers given to them by a certain Act of Parliament (setting out the year and title).

Held: that this general form of plea was good, and that it was not necessary to allege the particular facts upon which the defendants relied as bringing them within the statute.

DECLARATION stated that plaintiff was possessed of certain land forming part of the bed of the Rochdale Canal; that defendants made and erected a certain bridge, to wit, a bridge across the said canal; also certain walls under and adjoining and near thereto: and that defendants, wrongfully and against the will of plaintiff, and without his authority or consent, caused the said bridge and walls to be so made, built, and constructed, that parts of the same extended and projected, and have ever since extended and projected, and do still extend and project, above and over parts of the said lands of the plaintiff.

*45] Plea. That the several acts, matters, and things, *whereof the plaintiff complains, were lawfully done, performed, and executed by the defendant under, in pursuance, and in exercise and by virtue, of the powers contained in and given to the defendants by an Act of Parliament, made, &c. (8 & 9 Vict. c. cxli., local and personal, public, "To effect improvements in the borough of Manchester for the purpose of promoting the health of the inhabitants thereof").

Demurrer. Joinder. (The plaintiff also new assigned.)

Manisty, for the plaintiffs.—The plea is bad both in form and in substance. The defendants ought, after setting out the Act of Parliament under which they allege themselves to have acted, to have set out the particular facts which brought them within its provisions: *Benson v. Welby*, 2 Wms. Saund. 154. In note (6) to that case (a) it is said: "If it were a public statute, of which the court was bound to take judicial notice without being pleaded, still the defendant ought not to have demurred to the declaration, but should have stated those facts which would have brought his case within the statute, in the same manner as is necessary when a defendant protects himself under the authority of any other general law, and so have shown that he acted under the statute." [COLERIDGE, J.—The plea admits the facts as stated in the declaration. CROMPTON, J.—The legislature often gives this mode of pleading in particular cases.] Yes, in particular cases. But, if it *46] be allowed generally, the provisions as to the plea of Not guilty *by statute in certain instances are unnecessary. [WIGHTMAN, J.—That form of plea goes further: it denies the facts. CROMPTON, J.—The plaintiff might formerly have demurred specially to this form of pleading: that cannot be done now; but, if the plea were uncertain, he might have applied at Chambers for an amendment. But can you demur generally?] The plea is, no doubt, uncertain and embarrassing.

But, further, the plaintiff has clearly a right to demur generally, on

the ground that the Act does not justify the encroachment complained of. (The argument on the construction of the local Act is omitted.)

Hugh Hill, *contra*.—As to the form of the plea, the plaintiff has new assigned, so that he is not really hindered or embarrassed by the mode in which it is drawn. Then, many cases may be put in which the provisions of the local Act would extend to acts such as those complained of. [WIGHTMAN, J.—That is clearly so.]

Manisty, in reply.—Admitting that the act complained of may, under certain circumstances, be within the provisions of the Act, the defendants have here in fact done more than they were authorized to do. [WIGHTMAN, J.—That question you are to raise on your new assignment.]

Per CURIAM.(a)

Judgment for defendants.(b)

(a) Coleridge, Wightman, Erle, and Crompton, Js.

(b) Reported by Francis Ellis, Esq.

***The PLATE GLASS UNIVERSAL INSURANCE [47.
COMPANY v. SUNLEY. June 24.**

Action by a joint stock company, incorporated under stat. 7 & 8 Vict. c. 110, against a shareholder, for a call. Plea, on equitable grounds: that before the said call defendant, being then a director, agreed with the other directors that he should retire from the Company, and transfer his shares to the secretary as trustee for the Company, and should be released and indemnified by the Company from all liability to the Company's debts; that defendant carried out his part of the agreement; and that the said transfer "was duly entered, registered, and accepted by the said Company." On demurrer, held good; that, upon the pleadings, the transfer and acceptance must be taken to have been made according to the provisions of the statute, and that sects. 27 and 29 did not apply to contracts, by the directors, of this description.

Plea: that, after the call, plaintiffs sold their business to another Company, on the terms that the said Company should take upon themselves all the liabilities of plaintiffs, including those in respect of which the said call was made: and that the claim in the declaration mentioned was, by the said sale on the terms aforesaid, and with the consent of the defendant and plaintiffs, fully satisfied and discharged. On demurrer, held bad.

THE declaration stated that plaintiffs, being a joint stock company completely registered according to the statutes made and passed for the registration, incorporation, and regulation of joint stock companies, sued the defendant, for that he, at the time of the commencement of this suit, as the holder of 2000 shares in the said Company, was indebted to the said Company in the sum of 500*l.* for certain instalments of capital then due and payable in respect of the said shares. Breach: non-payment.

Third plea, upon equitable grounds: That the said shares are shares of 1*l.* each, upon which defendant has paid to plaintiffs 10*s.* per share, amounting to 1000*l.*, and that, before the making of the said call, defendant, being the holder of the said shares on which he had paid the said sum of 1000*l.*, was a director of the said Company: that, disputes having arisen between him and the other directors of the Company, it was agreed, between defendant and the said other directors, that *defendant should retire from the Company and relinquish his said shares for [48 the benefit of the Company, and transfer the same to the secretary as a

trustee for the Company; and should be released and indemnified by the Company and the said other directors from all liability to the debts of the Company: which agreement was accordingly carried out and fully executed on defendant's part; and he retired from the Company, and relinquished his said shares for the benefit of the Company, and transferred the same to the secretary of the Company, as a trustee for the Company: "which transfer was duly entered, registered, and accepted by the said Company;" and the defendant hath from thence hitherto ceased to be, or to act as, a director or shareholder of the Company. That the said call was afterwards made by the same directors by whom the said agreement was made, they from thence hitherto continuing and still being the only directors of the Company, in fraud and violation thereof, for the fraudulent purpose of compelling defendant to pay the said call for the benefit of them, the said directors, although the said Company have from thence hitherto had, and still have, the benefit of the said agreement; and the said shares have, from the time of the said transfer, been held, and still are held, in trust for the said Company; and that no shareholder or member of the said Company, other than the said directors who were parties to the said agreement, were or ever have been parties to the said call; and that the said directors, although shareholders of the said Company, have not paid, and do not intend to pay, the said call on their shares in the said Company, or any part thereof; and that the said call is not required for the purposes of the

*49] said Company: and that this action is brought by the directors alone, and by their sole authority, in the name of the said Company, in fraud of the said agreement and of defendant, and for the purpose of defrauding the defendant of the said money.

Fourth plea: That after making the said call, plaintiffs sold their business to a Company called The Plate Glass and Municipal Life Association, on the terms that the said Company should take upon themselves all the liabilities of plaintiffs; and the said Company, in consideration of the said sale, then took upon themselves all the liabilities of plaintiffs, including the liabilities for and in respect of which the said call was made; and the claim in the declaration mentioned was, by the said sale on the terms aforesaid, and with the consent of defendant and plaintiffs, fully satisfied and discharged.

Demurrers to the third and fourth pleas. Joinders in demurrer.

Pigott, Serjt., for the plaintiffs.—First, as to the third plea. The agreement there set out is ultra vires, as regards the directors. There are numerous cases, of which *Colman v. Eastern Counties Railway Company*, 10 Beav. 1, is one, in which it is laid down that the directors of a joint stock company, incorporated under stat. 7 & 8 Vict. c. 110, cannot, in that capacity, do any act which is not connected with the object for which the Company is incorporated: and the agreement here to accept the shares is a transaction which has clearly no connection with the regular course of business of the Company. Moreover, the contract between the

*50] directors and the defendant is contrary to the provisions of sect. 27, which provides that the directors shall not purchase any shares of the Company without the authority and sanction of a general meeting of the shareholders. [*WIGHTMAN, J.*—The plea alleges that the shares were "duly accepted" by the Company.] They could be accepted only at a general meeting. [*WIGHTMAN, J.*—Then you should have traversed the accept-

ance. It must be taken, upon the plea, that the Company accepted according to the statutory form.] This is an equitable plea. [COLERIDGE, J.—You can hardly contend that, in equity, the Company is not bound, if it has virtually accepted.] Further, sect. 29 provides that the terms of any contract made by the Company, in which a director may be interested, shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose, and shall not have force until confirmed by the majority at such meeting. The plea does not show that this provision was complied with. [COLERIDGE, J.—“Any contract” there refers to the class of contracts mentioned in the earlier part of the section, namely, by a director, for or on behalf of the Company, for land, materials, &c.] But then follow the words “or for any purpose whatsoever.” [COLERIDGE, J.—That means, ejusdem generis, and where the director contracts “by or on behalf of the Company.” In that case he is to be disqualified, as regards such contract, from acting as a director.] That is so; but, besides that, the contract is to be submitted to a meeting of shareholders. [COLERIDGE, J.—Only a contract of the description. According to your argument, all directors would be disqualified from acting *as such. WIGHTMAN, J.—Besides, the [*51 director is to be disqualified only while the contract is going on: here the contract is over, and over upon the face of the plea, with the proper assent of the Company.] Then, as to the fourth plea. That is clearly bad, as it sets up by way of defence an assignment by the Company of a chose in action, namely, the right to receive money upon calls. [WIGHTMAN, J.—As an incident of their business.] Such an assignment could not destroy the liability of the shareholders to the original directors, upon a call made before the assignment.

G. Rochfort Clarke, for the defendant.—[Per CURIAM.—You need not argue in support of the third plea.] The fourth plea is also good. After the sale of the business, the Company was at an end as a joint stock company, and had no power to receive money upon calls. [COLERIDGE, J.—That seems a very short mode of winding up.] It would not, of course, destroy the liability of the Company to their creditors; but it put an end to engagements among themselves. [COLERIDGE, J.—The plea alleges that “all” claims were by the said sale discharged.] That means only all claims among themselves. [COLERIDGE, J.—If the plea had also alleged that all the creditors of the Company had concurred in the assignment, the plea might have been good. WIGHTMAN, J.—As it now stands, it shows no agreement binding upon the other Company.] At all events, it binds the plaintiffs not to enforce calls.

COLERIDGE, J.—I am of opinion that the fourth plea is bad. The sale by the plaintiffs of their business to another Company is no defence to a claim for a call *made before such sale, and which we must [*52 assume, upon the pleadings, to have been legally made. The third plea, I think, is good. The provisions of the 27th and 29th sections of stat. 7 & 8 Vict. c. 110, do not affect the present question. The agreement, as set out in the plea, was, that the shares were to be transferred by the defendant to the secretary, as trustee for the Company, and that the defendant should be indemnified by the Company from all liability to the Company’s debts: the plea then alleges that this agreement was carried out by the defendant on his part, and that the said transfer “was duly entered, registered, and accepted by the

said Company." If the acceptance had been traversed, that would have been a material issue, and the defendant must have proved an acceptance according to the statute. Upon the same principle, as the acceptance is not traversed, it must be taken, upon the pleadings, that it was according to the statute. The provisions of the 27th and 29th sections do not touch the present case. Sect. 27 is directed against traffic in shares by the directors, on their own account, and not to transactions entered into, as this agreement was, by the directors on behalf of, and as representing, the Company. Then, as to sect. 29, the contracts there mentioned are clearly those described more specifically in the earlier part of the section, namely, contracts made by any of the directors for their individual benefit: and the words "for any purpose whatsoever" must be taken as applying only to contracts ejusdem generis. Sect. 29 provides that, during the existence of any such contract, the director interested in it shall not act as a director, and that the contract shall be submitted to and *approved by a majority of the *53] shareholders; but this is clearly not such a contract: and further, it is concluded, and concluded with the assent of the Company.

WIGHTMAN, J.—I am of the same opinion. Sect. 29 applies only to contracts in which the directors have a personal interest, not to contracts made by them merely on behalf of the Company as such. Here the agreement was really made by the whole Company. The plea also alleged that the transfer was duly accepted by the Company: that must, in the absence of any traverse by the plaintiffs, be taken to mean that it was accepted in the form provided by the statute; and, if issue had been taken upon the allegation of the acceptance, the defendant would have had to prove an acceptance in that form. The fourth plea I think bad, for the reasons stated by my brother Coleridge.

(No other judge was present.)

Judgment for the defendant on the third plea; for the plaintiffs on the fourth plea.(a)

(a) Reported by Francis Ellis, Esq.

*54] *THOMAS MANSELL v. The QUEEN, in Error. *June 24.*

On the record of the trial of an indictment for a capital felony at the Assizes, entries were made by which it appeared that the panel of jurors returned by the sheriff was read over in order, omitting only the names of twelve jurors who, it was known, were then in the custody of the sheriff, deliberating on their verdict in another case. On the names being read, several were challenged peremptorily for the prisoner; and several were, on the prayer of the counsel for the Crown, ordered to "stand by," the counsel for the prisoner insisting that they should be sworn unless the Crown forthwith assigned cause for its challenge. When the panel had thus been read through, nine jurors had been elected. The name of I., the first who had been ordered to "stand by," was called a second time; and he answered. The counsel for the Crown prayed that he might again stand by; the counsel for the prisoner objected. Before anything was done on this request, the absent twelve came in and gave their verdict in the other case. The counsel for the Crown then prayed that I. be again directed to stand by until these twelve jurors were called. The judge so directed; and from these a complete jury was made up, to whom the prisoner was given in charge. Verdict, Guilty. Sentence of death. The record, being thus made up, was removed by writ of error into the Queen's Bench, where the judgment was affirmed. And, on a further writ of error, a transcript of the record of the

Queen's Bench was removed into the Exchequer Chamber, where the judgment of the Queen's Bench was affirmed.

Quere, Whether the above matter was properly placed upon the record, or was examinable in error at all? *Semble*, that it was not. But, on the assumption that it was so examinable, Held, by the Queen's Bench, and affirmed by the Exchequer Chamber, that the Crown is entitled, as of right, to set aside any juror when called, and is not bound to challenge the juror for cause until the whole panel is perused, and it is found that without him a complete jury cannot be obtained.

Held that, until the twelve had been called, the panel could in no sense be perused; and that, till then, the time when the Crown was bound to assign cause had not come. *Semble*, that the panel cannot be said to be perused until all reasonable steps have been taken to cause the whole of the jurors on it to answer.

It was suggested that the judge had, of his own mere motion, ordered a juror, who, on being called, declared that he had conscientious objections to capital punishment, to stand aside; but on the record it appeared to have been done at the prayer of the counsel for the Crown.

Semble, that, if it had been done at the mere motion of the judge, it would have been unobjectionable.

In the instances of the jurors who were passed by upon the objection for the Crown, it appeared that the order of the Court was, in form, that the jurors should "stand by." Held, that the form was unobjectionable.

It was not stated on the record that the jurors on the panel were good and lawful men of the county. It appeared that, by the venire, the sheriff was ordered to return good and lawful men of the county, and that, for the purpose aforesaid, he had impanelled and returned the persons on the panel. Held, that there was no error.

The practice of the new Court of Exchequer Chamber in error, in criminal cases, was ordered to be the same as the practice of the Queen's Bench in error in similar cases.

THE plaintiff in error was indicted for murder, and convicted, at the Winter Assizes for Kent, *December, 1856; and judgment of [*55 death was passed upon him. A writ of error, returnable in this Court, was afterwards obtained, upon the fiat of Sir R. Bethell, Attorney-General; to which a return was made. In last Easter Term, (a) under a writ of habeas corpus ad satisfaciendum, directed to the Governor and Keeper of Maidstone gaol, the plaintiff in error was brought into Court, in custody of the said governor; and by his counsel, Francis Russell, prayedoyer of the writ of error and the return thereto: and the same were read, as follows:—

"Victoria, by the grace," &c. "To our justices of oyer and terminer in and for our county of Kent, assigned to deliver the gaol of the said county," &c., "greeting. Because in the record and proceedings, and also in the giving of a judgment, in a certain indictment made against Thomas Mansell for murder, whereof he was indicted, and, by a certain jury of the said county impanelled thereupon between us and the said Thomas Mansell, was convicted, as it was said, manifest error has intervened, to the great damage of the said Thomas Mansell, as by his complaint we are informed: We, being willing that the error (if error there be) should in due manner be corrected, and full and speedy justice done to the said T. Mansell in this behalf, do command you that, if judgment be given thereupon, you send to us distinctly and openly, under your seals or the seal of one of you, the record and proceedings aforesaid, with all things touching the same which are in your custody, and this writ; so that we may have them before us on the 12th day of January, instant, wheresoever we shall then be in England; that, the record and proceedings *aforesaid being inspected, we may cause to be further done thereupon for correcting that error what, if [*56

(a) April 24th, 1857. Before Lord Campbell, C. J., Erle and Crompton, Js.

right and according to the law and custom of our realm of England, ought to be done. Witness," &c.

"The execution of this writ appears by the record and proceedings and schedule hereunto annexed."

"The answer of the parties within named."

"Kent, to wit. Be it remembered, that at the general session of oyer and terminer," &c., setting forth the caption and indictment, which charged the plaintiff in error with the murder of Alexander M'Burney, the plea of Not guilty, the joinder by the clerk of the Assizes and clerk of the Crown. "Therefore let the jury thereupon, here and for this purpose by the sheriff impanelled and returned, immediately come before the said justices of our said Lady the Queen, last above named, and others their fellows aforesaid, of good and lawful men of the county aforesaid, qualified according to law, by whom the truth of the matter may be better known, and who are not of kin to the said T. Mansell, to recognise, upon your oath, whether the said T. Mansell be guilty of the felony and murder in the indictment aforesaid above specified, or Not guilty: because as well the said," &c. (clerk of the Assizes) "as the said T. Mansell have put themselves upon that jury. And the said sheriff, for the purpose aforesaid, impanels and returns the persons following, and arrays them in a panel, in the order following: that is to say: viz., Matthew Nicholson," &c. (naming 55 in all). "And the said Matthew Nicholson," &c. (naming the first 17); "being severally and successively called in the order in which their names aforesaid appear in the said panel as aforesaid, come, and are severally and successively *57] peremptorily challenged by the said T. Mansell, and altogether excepted from the said jury. And hereupon the said," &c. (the three jurors whose names were respectively 18th, 19th, and 20th), "being next severally called in the order in which their names appear in the said panel as aforesaid, come, and are elected and tried to the intent that they should be sworn to speak the truth of and concerning the premises in the said indictment against the said T. Mansell specified. And the said Thomas Platts" (the juror whose name stood 22d), "being next called, comes not. And the said Charles Penny" (the juror whose name stood 25th), "being next called, comes, and is peremptorily challenged by the said T. Mansell, and altogether excepted from the said jury. And the said William Iremonger" (the juror whose name stood 26th), "being next called, comes. And hereupon William Ribton, Esquire, barrister at law, who prosecutes for our Lady the Queen in this behalf, on behalf of our said Lady the Queen, prays the Court here that the said William Iremonger may be ordered to stand by. And the said T. Mansell, by Francis Russell, Esquire, barrister at law, his counsel, prays the Court here that, if our said Lady the Queen challenge the said W. Iremonger, she so challenge forthwith, and that the cause of such challenge may be shown to the Court here forthwith, and before any other person on the said panel be called; and saith that, by the laws of this realm, the said William Iremonger ought not to be ordered to stand by. And hereupon it is considered and adjudged and ordered by the Court here that the said William Iremonger do stand by. And the said John Shelton Isaac" (the juror whose name stood 27th), "being next called, comes and is elected," &c., to be sworn as before). "And the said

*Jacob Jacobs" (the juror whose name stood 28th), "being next called, comes; and the said W. Ribton," &c. (prayer that juror [*58 may stand by, objection, and order of Court as before). "And the said John Jewell" (the juror whose name stood 32d), "being next called, comes, and is elected," &c. (to be sworn as before). "And hereupon the said William Jukes and George Jury" (the jurors whose names stood respectively 33d and 34th), "are next severally called, and come; and the said William Ribton," &c. (prayer that the two may stand by, objection, and order of Court as before). "And hereupon the said John George Kennard" (the juror whose name stood 36th), "is next called, and comes, and is elected," &c. (to be sworn as before). "And hereupon the said James Kemp" (the juror whose name stood 37th), "is next called; and the said William Ribton," &c. (prayer that juror may stand by, objection, and order of Court as before). "And hereupon the said Robert Kettle" (the juror whose name stood 38th), "is next called, and comes, and is elected," &c. (to be sworn, as before). "And hereupon the said John Kierman," &c. (seven jurors, whose names stood respectively 39th, 40th, 41st, 42d, 43d, 45th, and 46th), "being next severally and successively called, severally and successively come; and the said William Ribton," &c. (prayer that these jurors may stand by, objection, and order of Court, as before). "And hereupon the said Michael Laing" (the juror whose name stood 47th), "being next called, comes, and is elected," &c., to be sworn as before). "And hereupon the said Stephen Lampard," &c. (the three jurors whose names stood respectively 48th, 49th, and 55th), "being next severally and successively called, come; and the said William Ribton," &c. (prayer that these jurors may stand *by, objection, and order of Court as before). "And hereupon [*59 the said John Langridge" (the juror whose name stood 50th), "being next called, comes, and is elected," &c. (to be sworn, as before). "And, for as much as the remainder" (i. e. the jurors whose names stood respectively 21st, 23d, 24th, 29th, 30th, 31st, 35th, 44th, 51st, 52d, 53d, 54th) "of the said several persons so impanelled and returned as aforesaid are a jury sworn and charged by the Court here to give their verdict upon a certain indictment for felony, at the suit of our said Lady the Queen, against one George Chapman, a prisoner in the gaol here, and, during the whole time when the several other persons so impanelled were being called, have been and still are absent from the Court here, having been committed to the custody of the sheriff by the Court here, to be by him safely kept until they shall have given their said verdict, therefore the said remainder of such persons are not now called. And hereupon the said W. Iremonger is again called, as he before was called, and again appears. And the said W. Ribton, on the part of our said Lady the Queen, prays the Court here that the said W. Iremonger be again ordered to stand by. And the said T. Mansell, by his counsel aforesaid, prays the Court here that, if our said Lady the Queen challenge the said W. Iremonger, cause of such challenge be forthwith shown to the Court here, and before any other of the persons whose names appear upon the said panel be called, and saith that, by the laws of this realm, the said W. Iremonger ought not to be ordered to stand by again. And thereupon the said Michael Aaron Jessell," &c. (the twelve not called), "being the jury before mentioned sworn and charged to deliver a verdict on the said indictment against

*60] the *said G. Chapman, come into Court here and give their verdict on the said last-mentioned indictment, and are forthwith discharged from the custody of the said sheriff. And hereupon the said W. Ribton on behalf of our said Lady the Queen, prays the Court here that the said W. Iremonger be ordered to stand by until the said several jurors hereinbefore lastly mentioned shall have been called to serve on the said jury between our said Lady the Queen and the said T. Mansell. And the said T. Mansell, by his counsel aforesaid, denies that, by the laws of this realm, the said W. Iremonger ought to be thus ordered to stand by, and demands that, in default of our said Lady the Queen forthwith challenging and assigning good cause of challenge against the said W. Iremonger, the said W. Iremonger may be elected and sworn upon the jury to try the premises in the said indictment against the said T. Mansell specified. And hereupon it is considered, adjudged, and ordered by the Court here that the said W. Iremonger do stand by accordingly. And thereupon the said W. Ribton, on behalf of our said Lady the Queen, prays the Court here that the residue of the said several persons so impanelled and returned as aforesaid, and who have not yet been called to serve on the said jury between our said Lady the Queen and the said T. Mansell, to wit, the said jurors so discharged from the custody of the said sheriff as aforesaid, be forthwith called. And the said T. Mansell, by his counsel aforesaid, denies that, by the laws of this realm, any of the said several last-mentioned persons can or ought to be called forthwith, and saith that, by the laws of this realm, such persons ought to be called in their proper order with other persons in the said panel, and not otherwise: and saith that the said Jacob
*61] Jacobs" *(the juror whose name stood 28th) "is the next person in such order, and ought to be called next in order after the said W. Iremonger. And hereupon the said Isaac Perry, Jabez Philpott, and William Parton" (the jurors whose names stood respectively 21st, 23d, and 24th, all of whom had been on Chapman's jury) "are now next called and come, and, together with the said," &c. (the nine already elected, namely, those whose names stood respectively 18th, 19th, 20th, 27th, 32d, 36th, 38th, 47th, and 50th), "are elected and tried to the intent that they should be sworn to speak the truth of and concerning the premises in the said indictment against the said T. Mansell specified. And hereupon the said Jabez Philpott, without being sworn, says that he has conscientious scruples against capital punishments. And hereupon the said W. Ribton, on behalf of our said Lady the Queen, prays the Court here that the said Jabez Philpott be ordered to stand by. And the said T. Mansell, by his counsel aforesaid, prays the Court here that, if our said Lady the Queen challenge the said Jabez Philpott, cause of such challenge be shown forthwith, and before any other person whose name appears on the said panel be called. And hereupon the learned Judge says: 'Undoubtedly, if you feel you cannot do your duty, you are quite right in saying so, and had better withdraw.' And hereupon the said Jabez Philpott withdraws himself from the rest of his fellows aforesaid. And hereupon it is considered, and adjudged and ordered, by the Court here, that the said Jabez Philpott do stand by, notwithstanding that the said T. Mansell, by the said F. Russell, his counsel aforesaid, denies that the said Jabez Philpott, having been so

called and elected as aforesaid, by the *laws of this realm can or ought to be ordered to stand by as aforesaid, and demands that, [*62 in default of our said Lady the Queen forthwith challenging and proving good cause of challenge against the said Jabez Philpott, the said Jabez Philpott may be sworn as a juror. And hereupon the said," &c. (ten jurors whose names stood respectively 29th, 30th, 31st, 35th, 44th, and 51st, and who were on Chapman's jury), "being next severally and successively called, come. And the said W. Ribton," &c. (prayer that these jurors may stand by, objection, and order of Court as before). "And the said William Leach" (the juryman whose name stood 54th, and who was one of Chapman's jury) "comes," &c. (peremptory challenge by defendant). "And hereupon the said William George Larking" (the juryman whose name stood 52d, and who was one of Chapman's jury) "is called, and comes, and is elected and tried to the intent that he shall be sworn as aforesaid in the place and stead of the said Jabez Philpott. And hereupon the said William George Larking, and the jurors aforesaid before elected and tried, save and except the said Jabez Philpott, are by the Court here in due form of law sworn to speak the truth of and concerning the premises in the said last-mentioned indictment specified: the said T. Mansell, by his counsel aforesaid, protesting that the said jury has been elected contrary to the laws of this realm, and that, in default of our said Lady the Queen assigning good cause of challenge against the said W. Iremonger, the said Jabez Philpott, and the said several other persons, so ordered to stand by as aforesaid, the said jury ought not to be so sworn as aforesaid. And hereupon it is considered and adjudged by the Court here that our said Lady the *Queen ought not to be compelled, and be not compelled, to assign [*63 any cause of challenge against the said W. Iremonger, the said Jabez Philpott, or any of the said last-mentioned several persons. Which said jurors, so elected, tried, and sworn to speak the truth of and concerning the premises aforesaid, in the said last-mentioned indictment specified, to wit, the said," &c. (the twelve jurors sworn), "upon their oath say," &c.: verdict of Guilty; and statement that the defendant is called on to say wherefore the justices ought not to proceed to judgment, and that he "nothing further saith except as before." Judgment of death: "and the said Thomas Mansell is forthwith committed," &c.

F. Russell then, on behalf of the defendant, craved leave to assign error, which was granted. The entry on the record was as follows:

"Easter Term, in the 20th year of the reign of Queen Victoria.

"And hereupon, on the 24th day of April, in the year of our Lord 1857, in this said Term, before our said Lady the Queen at Westminster, cometh the said Thomas Mansell in his proper person, in and under the custody of the governor of the gaol at Maidstone, in the county of Kent, by virtue of a writ of habeas corpus issued in that behalf, and saith that in the record and proceedings aforesaid, and also in the giving of the judgment against the said T. Mansell, there is manifest error in this. That the record does not show any sufficient ground why the said W. Iremonger, Jacob Jacobs," &c. (the jurors whose names stood respectively 26th, 28th, 33d, 34th, 37th, 48th, 49th, 55th), "Jabez Philpott," &c. (the jurors whose names stood respectively 23d, 29th,

*64] 30th, 31st, *35th, 44th, and 51st), "when they had severally been called and had appeared (or so many of them as were necessary to complete the number of the jury), were not elected and sworn as jurymen to try the issue between the said T. Mansell and the Queen. Wherefore in this there is manifest error.

"There is also error in this: that it appears by the record that, when each of the said last-mentioned jurors was called, and had come, the said W. Ribton prayed, on behalf of our Lady the Queen, that the juror might be ordered to stand by, and also, with respect to each of them, that it was considered, and adjudged and ordered by the Court, that he do stand by; whereas, by the law of this realm of England, the Court had no power to order the said last-mentioned jurors, or any of them, to stand by; as an order that a juror do stand by is an order not known to the law, and is vague and indefinite and uncertain in its meaning; and that, at any rate, the said Court had no jurisdiction to order any of the said jurors to stand by until he had been challenged on the part of our Lady the Queen, even though our Lady the Queen might not be bound to show the cause of such challenge forthwith, or had been challenged on the part of the said T. Mansell. Wherefore in this there is manifest error.

"There is also error in this: that it appears by the record that the names of all the jurors on the said panel were called in order from the first to the last, omitting only the names of the twelve who formed the jury on another charge of felony and who were out of Court in the custody of the sheriff, considering their verdict, during all the time that the panel was being gone through, and until after the said T. Mansell *65] had objected *to the said W. Iremonger being ordered to stand by a second time. That, when the last name on the panel had been called, and the panel had thus been gone through, only nine jurymen had appeared, excepting those who had been peremptorily challenged, or ordered to stand by; that the panel was begun to be gone through again, by the calling the said W. Iremonger a second time; that the said William Iremonger a second time appeared, and the said W. Ribton again prayed that the said W. Iremonger might be ordered to stand by, and the said T. Mansell again objected thereto; that the Court a second time ordered the said W. Iremonger to stand by, although no cause of challenge was alleged or proved against him; and the said W. Iremonger was not sworn as a jurymen to try the issue between the said T. Mansell and the Queen: Whereas, by the law of the land, the said W. Iremonger ought, on his second appearance, to have been elected and sworn as a jurymen; for, although our Lady the Queen may have the privilege of setting aside a juror for a time, without assigning cause of challenge, there is no such privilege after the panel has been gone through; and the panel in this case had been gone through in law, as all the jurors, who could at the time lawfully appear and act as jurymen, had been called before the said William Iremonger was called the second time. Wherefore in this there is manifest error.

"There is also error in this: that it appears by the said record that, after the said W. Iremonger was the second time ordered to stand by, the said W. Ribton prayed the court that the twelve jurors, who were out of court in the custody of the sheriff when the panel was first gone

through, should be called before any *other jurors on the said panel; and that Isaac Perry, being one of the said last-mentioned [*66 jurors, was called next after the said W. Iremonger, notwithstanding the said T. Mansell objected that Jacob Jacobs ought next to be called: whereas, by the law of the land, the jurors ought not to be called out of their regular order at the nomination of the counsel for our Lady the Queen, but the names of the jurors ought to be called in the order in which they stand upon the panel, beginning at the top, and that the name of the juror next on the panel below that of the said W. Iremonger ought to have been called next after that of the said W. Iremonger, instead of that of Isaac Perry, whose name stood higher on the panel than that of William Iremonger.

"There is also error in this: that it appears by the record that, after the said Jabez Philpott had been elected and tried to the intent that he should be sworn to try the issue between the said T. Mansell and the Queen, the said Jabez Philpott stated that he had conscientious scruples against capital punishments; that thereupon he was, on the application of the said W. Ribton, ordered by the court to stand by: whereas, by the law of the land, after a juror has once been elected as a jurymen, he cannot be challenged or ordered to stand by; and whereas, by the law of this land, the entertaining conscientious scruples against capital punishments is no ground of challenge, or of directing a juror to stand by; and the court had no jurisdiction to tell the said Jabez Philpott he had better withdraw, or to order him to stand by, until it was proved on oath, and had been found by triors duly chosen and sworn, that the said Jabez Philpott was not indifferent between our Lady the Queen and the said T. Mansell.

"*There is also error in this: that it does not appear by the [*67 record that the jurors who were elected and tried, to try the issue between the said T. Mansell and our Lady the Queen, were sworn in due course according to law.

"There is also error in this: that the matters contained in the record are not sufficient in law to warrant the judgment given against the said T. Mansell.

"There is also error in this: that, by the said record, it appears that judgment was given for our said Lady the Queen and against the said T. Mansell; whereas, by the law of this realm of England, judgment ought to have been given in favour of the said T. Mansell and against our said Lady the Queen.

"And the said T. Mansell prays that the judgment aforesaid, for the errors aforesaid and other errors appearing in the record and proceedings aforesaid, may be reversed, annulled, and wholly held for nothing; and that he may be restored to all things which by reason of the judgment and proceedings aforesaid he has lost."

"FRANCIS RUSSELL."

"And Charles Francis Robinson, Esquire, coroner and attorney of our said Lady the Queen, in the court of our said Lady the Queen, before the Queen herself, who for our said Lady the Queen in this behalf prosecuteth, being present here in court, and having heard the matters aforesaid above assigned for error, in manner and form aforesaid, for our said Lady the Queen saith that neither in the record nor proceedings aforesaid, nor in the giving of judgment aforesaid, is there any error.

Therefore the said coroner and attorney of our said Lady the Queen, for our said Lady the Queen, prayeth that the court of our said Lady *68] the Queen now *here may proceed to examine, as well the record and proceedings aforesaid, and the judgment thereon given as aforesaid, as the matter above assigned and alleged for error; and that the judgment may in all things be affirmed."

F. Russell, for the prisoner, then prayed that counsel might be assigned to the prisoner; which was granted. The following rule was drawn up.

Friday, the 24th day of April, in the 20th year of Queen Victoria.

"Thomas Mansell, the plaintiff in error, being brought here into court in custody of the keeper of her Majesty's gaol at Maidstone, in and for the county of Kent, by virtue of a writ of habeas corpus: It is ordered that the said writ and the return made thereto be filed. And, the said plaintiff in error producing a writ of error, and prayingoyer of the record and judgment against him upon an indictment of murder, and the same being read to him, the said plaintiff in error now here in court assigns errors, and prays counsel to be assigned to him. It is further ordered that the said assignment of errors be filed; and that Francis Russell, Esq., and the Honourable George Denman be assigned to be of counsel for the said plaintiff in error. And the said plaintiff in error is now here, in court, committed to the custody of the keeper of Her Majesty's gaol of Newgate, charged with the matters in the said return mentioned; which matters are as follows, to wit: 'The said Thomas Mansell was committed to, and detained in the custody of the keeper of, the said gaol at Maidstone, by virtue of a certain warrant or order of court, in the words following, that is to say: Kent: At the general session of the delivery of the gaol of the county of Kent, holden at *69] *Maidstone in and for the said county, on Monday the 15th day of December, in the year of our Lord 1856, before the Honourable Sir George Wilshere Bramwell, Knight, one of the Barons of our Lady the Queen, of Her Court of Exchequer, and others his fellows, justices of our said Lady the Queen, assigned to deliver the said gaol of the prisoners therein being; Thomas Mansell, convicted of felony, is ordered to be hanged by the neck until he be dead, and his body to be afterwards buried within the precincts of the prison in which he shall have been confined after his conviction. By the court.—R. Marshall Straight, deputy clerk of Assize:' Which said sentence of death has been respited by command of our said Lady the Queen, until the 11th day of May next: To be by the said keeper of Her Majesty's gaol of Newgate kept in safe custody until he shall be from thence discharged by due course of law. And it is further ordered that the said keeper of Newgate, or his deputy, do bring the said plaintiff in error before this court on Saturday the 2d day of May next.(a)

"On the motion of Mr. *F. Russell*. By the Court."

F. Russell then prayed for a concilium; which was appointed for the 2d of May then next.

On the said 2d May, 1857,(b) the defendant was brought into Court in custody of the keeper of the gaol of Newgate; and the case was argued by *F. Russell*, for the plaintiff in error, and by *Welsby* for the

(a) See *Laver's Case*, 16 How. St. Trials, 115.

(b) Before Lord Campbell, C. J., Wightman, Erie, and Crompton, Js.

Crown. It is thought sufficient to refer to the argument in the Exchequer Chamber, and to the judgments in this Court and the Exchequer Chamber.

Cur. adv. vult.

The following order was then made.

*"The plaintiff in error, Thomas Mansell, being brought here into Court in custody of the keeper of Her Majesty's gaol of Newgate, by virtue of a rule of this Court, is remanded to the same custody, charged with the matters in the said rule mentioned. And it is further ordered that the said keeper of Newgate do bring the said Thomas Mansell before this Court on Wednesday next. [*70]

"On the motion of Mr. *Welsby*."

On Wednesday, May 6th, 1857, the plaintiff in error was again brought into Court in custody of the keeper of the gaol of Newgate.

Lord CAMPBELL, C. J., then delivered the judgment of the Court.

Having anxiously considered this case, and examined all the authorities cited during the argument at the bar, we have all come to the conclusion that none of the errors assigned can be supported, the prisoner having been convicted and sentenced to death after a fair trial, according to the laws of England.

Our judgment chiefly depends upon the right construction of the ancient statute, 4 stat. 33 Ed. 1, entitled "An ordinance for inquests," which was re-enacted by 6 G. 4, c. 50, s. 29. An abuse had arisen in the administration of justice, by the Crown assuming an unlimited right of challenging jurors without assigning cause, whereby inquests remained "untaken." In this way the Crown could, in an arbitrary manner, on every criminal trial, challenge so many of the jurors returned on the panel by the sheriff that twelve did not remain to make a jury; and the trial might be indefinitely postponed *pro defectu juratorum*, to the great oppression of the subject, and in contravention of the words of **Magna Charta* (1 stat. 9 H. 3, c. 29), "*Nulli*" "*differemus recitum vel justitiam*." The remedy was, to give to the party accused [*71] a right to be tried by the jurors summoned upon his arraignment, if, after the limited number of challenges to which he was entitled without cause assigned, there remained twelve jurors of those returned upon the panel to whose qualification and unindifferency no specific objection to be proved by legal evidence could be made. To prevent the trial going off for want of jurors by the peremptory challenges of the Crown, it is enacted that "they that sue for the king" "shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the Court." But there was no intention of taking away all power of peremptory challenge from the Crown, while that power, to the number of thirty-five, was left to the prisoner. Indeed, unless this power were given under certain restrictions to both sides, it is quite obvious that justice could not be satisfactorily administered; for it must often happen that a juror is returned on the panel who does not stand indifferent, and who is not fit to serve upon the trial, although no legal evidence could be adduced to prove his unfitness. The object of the statute is fully attained if the Crown be prevented from exercising its power of peremptory challenge, so as to make the trial go off while there are twelve of those returned upon the panel who cannot be proved to be liable to a valid objection. Accordingly, the course has invariably been, from the passing of the statute to

the present time, to permit the Crown to challenge without cause till the panel has been called over and exhausted, and then to call over the *72] names of the jurors peremptorily challenged by the *Crown, and to put the Crown to assign cause, so that, if twelve of those upon the panel remain as to whom no just cause of objection can be assigned, the trial may proceed. In our books of authority, the rule is laid down that the King need not show any cause of his challenge till the whole panel be gone through, and it appear that there will not be a full jury without the person so challenged.

This rule (with a view probably of conveying to the bystanders the notion that it operates harshly against the prisoner) has often been questioned: but it has as often been recognised and established by the presiding judges. The last instance of this was on *The Trial of John Frost(a)* for high treason in the year 1840, when Lord Chief Justice Tindal, the presiding Judge, without calling upon the counsel for the Crown for an answer, observed, p. 49: "We really are called upon, after a construction has been put upon this Act of Parliament, from the very period when it was passed, in the 33d of Edward I., down to the present time, to put a construction different from that which prevailed at the time the statute was enacted, and different from that which all our predecessors have put. Where would be the certainty of the law of England; what safety would there be for prisoners as well as for the public execution of justice, if judges, acting according to their own discretion, neglecting those rules of interpretation which wise men before them have laid down, and which have been sanctioned by time, were to do that for the first time which we are now called upon to do, namely, *73] to put a construction different from that which has been put by *all who have gone before them? It appears, however, to me, that, upon the language of the clause itself, it is by no means an unfair or improper conclusion to say that the Crown is not to be called upon to make its challenge until the panel has been gone through." Parke, B. and Williams, J., the associated judges, clearly concurred in this opinion. We may further observe that, as the statute of Edward I. was re-enacted in *ipsisimis verbis* after this construction had so long been put upon it, this construction must be considered to have the sanction of the Legislature; and indeed there is no reason to suppose that it has ever worked injustice.

Therefore, the first ground of error assigned, that there were jurors ordered to stand by on the application of the counsel for the prosecution, without any cause being assigned, entirely fails; and no objection can be taken to the regularity of the proceedings till the panel had been once gone through without a jury being formed. What was then the state of things, according to the record? And what was then done? Twelve of the jurors, returned upon the panel, were at that time shut up, deliberating upon their verdict in the case of George Chapman; and their names had not been called. Thereupon, the name of William Iremonger, who had been before challenged by the Crown without cause being assigned, was again called, and, being again challenged by the Crown, the prisoner's counsel prayed that the Crown might now be put to assign cause, and that otherwise William Iremonger should not be ordered to stand by. At this moment, before any judgment was given

(a) Taken in short-hand by Joseph and Thomas Gurney. London, 1840.

by the court, the twelve jurors who had sat as the jury upon Chapman, came into court, gave their verdict, and were discharged. They being now in court, and the *formation of the jury in Mansell's case [*74 being in progress, the counsel for the Crown prayed that William Iremonger should be ordered to stand by until the twelve who had served in Chapman's case should be called to serve on the jury between the Queen and Thomas Mansell. This was objected to by the counsel for the prisoner, who prayed that William Iremonger should be sworn upon this jury, unless cause of challenge were forthwith assigned by the Crown. The court adjudged that William Iremonger should stand by, and, further, that the names of the jurors who so came into court should then be called, instead of the name of Jacob Jacobs, who stood in the panel next after William Iremonger.

The counsel for the prisoner argued, before us, that all these proceedings subsequent to the calling of the name of William Iremonger the second time were erroneous. To decide upon his objections, we must consider what is the meaning of *going through*, or *perusing*, the *panel*, according to the rule laid down upon this subject. If it be that, when the panel has been once called over, no jurors who did not answer to their names and who were then absent can be afterwards called and considered as jurors on the panel, although they immediately afterwards come into court before any other step in the proceeding is perfected, the plaintiff in error would be entitled to succeed; for we do not attach any importance to the fact that the names of the twelve jurors on Chapman's jury were not called in going over the panel when they were shut up in the custody of the sheriff. But this seems a very narrow construction of the rule: it would lead to very inconvenient consequences; and it is not at all necessary for the object which the statute had in view. Suppose that a juror is *absent from court for some [*75 temporary purpose when his name is called, and he returns into court immediately after the last name on the panel has been called, and offers to serve, and, being unobjectionable, he would make up a jury of twelve, is he to be rejected, and is the list of those before challenged by the Crown to be again resorted to so that the Crown may be put to assign cause of challenge? According to the modern practice of having at the Assizes one panel of jurors both for civil and criminal trials, and having two criminal courts sitting at the same time, it can hardly ever be expected that all the jurors on the panel should answer to their names, or be in court at the same time when the names on the panel are called over: and the Crown would often be entirely deprived of the limited right of challenging without cause, preserved to it for the due administration of justice, if, when the panel has once been called over, the obligation of challenging for cause the jurors ordered to stand by were immediately to arise. But we are of opinion that the panel is not to be considered as *gone through*, so as to require the Crown to assign cause of challenge, till it is *exhausted*, i. e. till, according to the usual practice of the court and what may reasonably be done, the fact is ascertained that there are no more of the jurors on the panel whose attendance may be procured, and that, without requiring the Crown to assign cause of challenge, the trial could not proceed. In the present case the panel had not been exhausted, although once called over: and the twelve jurors who had served on Chapman's jury, came into court

when only nine jurors had been elected and sworn for Mansell's jury, and when the remaining three might be taken from these twelve as *76] conveniently, and as much *for the advantage of the prisoner, as if they had all been in Court, and had answered to their names when the panel was first called over.

In none of the cases referred to by the prisoner's counsel do we find anything to differ from this view of the subject. No doubt it may be assumed, *prima facie*, that all the jurors on the panel are in court when the panel is called over: and, if, when it has been once called over, there is not a full jury made, the usual course would be immediately to call the names over again, and to put the Crown upon assigning cause of challenge. The language used by the judges on these occasions is in reference to this supposition, that all were in court and answered to their names: but there is no decision nor dictum to the effect that the panel may not be called over again with a view to see whether there may not be some of the jurors on the panel who may have come into court, and who may make up a full jury without putting the Crown to assign cause of challenge. It is always understood that the peremptory challenges of the Crown shall not put off the trial, nor admit a supplemental panel of jurors to be returned by the sheriff. But, taking care to treat as jurors who may serve on the jury only those who are returned on the original panel, there is nothing to show that they are not to be deemed for all purposes on the panel if they appear and are ready to be sworn before the formation of the jury is completed.

Neither in *Coningsmark's Case*, 9 How. St. Tr. 1, 12, nor in *O'Coigly's Case*, 26 How. St. Tr. 1191, 1231, nor in *Horne Tooke's Case*, 25 How. St. Tr. 1, 25, does anything occur to countenance the doctrine now *77] contended for *on behalf of the plaintiff in error. In *Spencer Cowper's Case*, 13 How. St. Tr. 1105, 1108, Baron Hatsell does intimate an opinion that under the circumstances there stated, the Crown ought to show cause of challenge: but that was after it had been ascertained that a full jury could not be made out from the panel by reason of the peremptory challenges of the prosecutor; and there can be no doubt that under such circumstances cause of challenge must be assigned.

Chief reliance was placed on *Regina v. Geach*, 9 Car. & P. 499 (E. C. L. R. vol. 38). But there Parke, B., who presided, laid down the well known rule: "The Crown may challenge without showing cause till the panel is gone through, and if there is not a full jury, they must show cause." It turning out, after once calling over the whole panel, that there was not a full jury, the learned judge says: "The proper course will be to call the panel over in the same order as before, calling those who did not answer before, and omitting to call those who have been already peremptorily challenged by the prisoner." Nothing more was decided or said which can be considered applicable to the present case, the discussion which follows being merely as to what is a good cause of challenge. Now there can be no doubt that the course pointed out by the learned judge was, under the circumstances, the proper course: but is there any reason to suppose that, if, after the panel had been once called over, and before any further step had been taken for the formation of the jury, jurors on the panel who had been called and did not at first answer, had come into court in sufficient number to make

a full jury, they would have been rejected, and the Crown would have been put to assign cause for its challenges?

*Mr. *Welaby* brought to our notice one instance since the Revolution of 1688, and therefore to be respected, in which, upon a trial [*78 for high treason, it was decided by a judge of great eminence and high character that, after the panel had been once called over, it might be called over again, with a view to procure the attendance of jurors who had not been in court when it was first called over. In the State Trials we find the following dialogue recorded as having occurred during the Trial of Peter Cook, 13 How. St. Tr. 311, 317. "*Cl. of Ar.* My Lord, we have gone through the panel, we must now call the defaulters again. Thomas Clark.—*Clark.* Here. Sir *B. Shower.* Was he here when he was called over? *Att. Gen.* That is nothing, he is here now. Sir *B. Shower.* But if there be a default of the jury, and the King's counsel have challenged any one, they ought to show their cause; therefore we desire that they may show their cause why they challenged Mr. Simmons? L. C. J. TREBY. The King has power to challenge without showing cause till the panel be gone through; but if there be a default of jurors when the King challenges, the King's counsel must show cause. Sir *B. Shower.* Here is a default of jurors, my Lord. L. C. J. TREBY. Nobody is recorded absolutely a defaulter, if he comes in time enough to be sworn." So Mr. Clark was sworn, instead of the King being obliged to show cause for challenging Mr. Simmons. This, therefore, is an authority expressly in point, to show that William Iremonger was properly ordered to stand by, other jurors in the panel being ready to be sworn in sufficient numbers to make up a full jury without him.

*Mr. *Russell* dwelt much on a supposed vested interest that the prisoner had acquired in William Iremonger, as one of the jury [*79 to try him, unless cause could be shown by the Crown to prove that he did not stand indifferent. But, in truth and according to law, there is no necessity nor right that a prisoner shall be tried by particular jurymen till the prisoner has been given in charge to the jury. After prisoners have had their challenges, the oath of the jurymen is: "You shall well and truly try, and a true deliverance make, between our Sovereign Lady the Queen and the several prisoners *you shall have in charge.*" When the prisoner is given in charge to the jury, by that jury he must be tried; and in felony or treason the jury cannot separate till they have found their verdict. But (as often happens at the Assizes), before a particular prisoner who has had his challenges is given in charge to the jury, the Court rises, and the jury separate. Next morning a new jury is called, when the prisoner again has his challenges; and possibly there may not be one individual upon the second jury that was sworn upon the first; yet all this is regular.

We now come to the assignment of error respecting Jabez Philpott. The facts, as gathered from the record, are: that he was allowed to go into the jury box with intent that he should be sworn and serve as a jurymen, without any objection being made to him on either side. Then, before being sworn, he spontaneously said that he had conscientious scruples against capital punishments. The counsel for the Crown, without assigning this as cause of challenge, simply prayed the Court that Jabez Philpott should be ordered to stand by. The prisoner's

*80] counsel prayed that the Crown should show *cause of challenge. The presiding Judge said: "Undoubtedly, if you feel you cannot do your duty, you are quite right in saying so, and had better withdraw." Jabez Philpott then withdrew; and thereupon it was "adjudged and ordered, by the Court here, that the said Jabez Philpott do stand by."

It is contended that this was erroneous, and that the Court was bound to order Jabez Philpott to be sworn upon the jury. But we are of opinion that the Court was bound, on the prayer of the counsel for the Crown, to order him to stand by. We here attach no weight to what Jabez Philpott said; and we consider this a challenge by the Crown without assigning cause, the panel not yet being exhausted, and there being a probability that a full jury might be made up without swearing this individual. Nor do we attach any weight to the remark which fell from the learned Judge, although it be unnecessarily set out upon the record.

But we wish it to be understood that we by no means acquiesce in the doctrine boldly contended for at the bar, on the authority of Brownlow in an Anonymous (1 Brownl. & Gold 41) case, that a Judge, on the trial of a criminal case, has no authority, if there be no challenge either by the Crown or by the prisoner, to excuse a juryman on the panel when he is called, or to order him to withdraw, although he is palpably unfit by physical or mental infirmity to do his duty in the jury box. We are not now to define the limits of this authority; but we cannot doubt that there may be cases, as if a juryman were completely deaf, or blind, or afflicted with bodily disease which rendered it impossible to
 *81] continue in the jury *box without danger to his life, or were insane, or drunk, or with his mind so occupied by the impending death of a near relation that he could not duly attend to the evidence, in which, although from there being no counsel employed on either side, or for some other reason, there is no objection made to the juryman being sworn, it would be the duty of the Judge to prevent the scandal and the perversion of justice which would arise from compelling or permitting such a juryman to be sworn, and to join in a verdict on the life or death of a fellow-creature.

We have now to attend to some objections of mere form, which, it is said, afford sufficient ground for reversing the judgment. Exception is taken to the expression in the record, that the Court ordered and adjudged jurymen to *stand by*, said to be language unknown to the law. The meaning of it, however, is quite obvious, viz.: that, being challenged by the Crown, the consideration of the challenge should be postponed till it should be seen whether a full jury might not be made without them by others in the panel. No authority has been cited to show that "challenge" is a *vox signata* which must be used like "feloniously," or "burglariously," or "of malice aforethought:" and, if the expression conveys no legal meaning, error cannot be assigned upon it.

Another objection pointed out by the prisoner's counsel was, that the record states that Jabez Philpott had been "called" and "elected and tried to the intent that" he "should be sworn," before the prayer on behalf of the Crown that he should stand by. But he had not been sworn; and the statement can only mean that he had been allowed to

enter the box, that he might be sworn *and serve upon the jury, [82 if, when he came to the book to be sworn, and before he was sworn, no objection should be made to him. There can be no doubt that at this time he might have been challenged by the prisoner; and the record shows that the prisoner's counsel required that cause of challenge should then be shown against him by the Crown. If he could then have been challenged for cause by the Crown, what reason can there be for saying that he could not then be challenged by the Crown without cause, there being still several jurors present who had not been challenged, either by the Crown or the prisoner, from whom a full jury might be made?

Then it was objected that the record does not show that the jurors named in the panel were "good and lawful men of the county of Kent:" and the case of *Whitehead v. The Queen*, 7 Q. B. 582 (E. C. L. R. vol. 53), was cited, in which Patteson, J., expressed an opinion that the caption of an indictment was bad for not showing that the indictment was found by good and lawful men of the county. But, whether that opinion be right or wrong, in the present case, by reasonable intentment, the jurors must be taken to have been good and lawful Kentish men. The award of the venire to the sheriff of Kent requires him to have before the Queen's justices "good and lawful men of the county aforesaid, qualified according to law, by whom the truth of the matter may be better known." The record then goes on to allege that "the said sheriff, for the purpose aforesaid, impanels and returns the persons following, and arrays them in a panel," &c. He professes to obey the mandate he has received; and we must presume that he has done his duty and has obeyed it.

*We do not think it necessary to take further notice of the objection deduced from the supposed want of power in a Commissioner, [83 under a commission of oyer and terminer and general gaol delivery, to do what might be done by the Court of Queen's Bench, than to say that, although in various matters the Court of Queen's Bench has powers which do not belong to Commissioners of oyer and terminer and general gaol delivery, the statute in question must receive the same construction before all Courts and all Judges; and a party accused must have the same rights, when on trial for his life, before whatever Court or Judge he may be tried.

We have only further to notice the objection that the names in the panel, after it had been gone through once, were not read in the order in which they stood in the panel, the twelve jurors who had served on the trial of Chapman standing in different parts of the panel, and being now called over consecutively, instead of the clerk of Assize calling the name of Jacob Jacobs, which stood immediately after that of William Iremonger. There are sayings to be found in the books, that the proper course is to call the names of the jurors as they stand in the panel: but there is no authority for asserting that this course may not be departed from when convenience requires: and, if the jurors who had served on Chapman's jury were to be called at all, the convenient course clearly was to call them immediately and consecutively, as all the others had been before called, and had been either sworn or challenged. At Frost's trial(a) for high treason, the counsel for the prisoner objected to the

(a) *The trial of John Frost, for High Treason*, pp. 26-7. London, 1840.

*84] jurors being called in the order in which they stood *in the panel. Where they are impanelled in alphabetical order, it seems absurd to require that on each trial the clerk of Assize must begin with the A's; and, if a second jury is called, it is difficult to say in what order, according to the rule contended for, the names ought to be called, so as to avoid the risk of the judgment being reversed upon a writ of error. There was here an additional gravamen, that the order in which the names were read was suggested by the counsel for the Crown. But, if the order was in itself unobjectionable, it could not become illegal from having been suggested either on behalf of the Crown or the prisoner.

Having thus travelled through all the alleged errors assigned on this record, and found that none of them can be supported in point of law, we have only to give judgment for the Crown.

Judgment affirmed.

The following order was then made.

"May 6th. Thomas Mansell, the plaintiff in error, being brought here into Court in custody of the keeper of Her Majesty's gaol of Newgate, by virtue of a rule of this Court: Upon hearing counsel on both sides: It is considered and adjudged by the Court here that the judgment given against the said Thomas Mansell at the Session of Delivery holden at Maidstone in and for the county of Kent on the 15th day of December last, upon an indictment against him for felony and murder, by which said judgment it was ordered that the said Thomas Mansell, the plaintiff in error, for the felony and murder aforesaid, should be hanged by the neck until he should be dead, and that the said Thomas Mansell be afterwards buried within the precincts of the prison *85] *in which he shall have been confined after his conviction, is good and sufficient in law. It is thereupon ordered that the said judgment be affirmed. And it is further ordered that the keeper of the said gaol of Newgate, present here in Court, do redeliver the said Thomas Mansell, the plaintiff in error, into the custody of the sheriff of the county of Kent and keeper of Her Majesty's gaol for the said county; And that the said sheriff of Kent do execution upon the said Thomas Mansell, the plaintiff in error, for the said felony and murder, in pursuance of the said judgment of the said Court of gaol delivery for the said county, and according to due form of law, on Monday the 18th day of May instant.

"Mr. *Welsby*, for the Crown.

"Mr. *Russell*, for the plaintiff in error."

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

THE Attorney-General having granted his fiat, a second writ of error, returnable in the Exchequer Chamber, was issued, which was returned with a transcript of the record in the Queen's Bench annexed, pursuant to the provisions of stat. 11 G. 4 & 1 W. 4, c. 70, s. 8.

In Trinity term the prisoner was brought into the Court of Exchequer Chamber (a) by writ of habeas corpus.

(a) On Saturday, June 13th, before Cockburn, C. J., Williams and Willes, Js., and Pollock C. B., Watson and Channell, Bs.

**F. Russell.*—The prisoner has been brought into this Court with a view to assign errors. This Court was created by stat. 11 G. 4 & [*86 1 W. 4, c. 70, s. 8; and this is the first case since that statute in which it has been desired to assign errors in a case of felony. It is necessary therefore to determine what is the proper mode of doing so. The General Rule of Hil. 4 W. 4, r. 12, 5 B. & Ad. xvi. (E. C. L. R. vol. 27), applies only to cases in which the three Superior Courts have a concurrent jurisdiction: *Rex v. Woollett*, 2 C. M. & R. 256.† [COCKBURN, C. J.—It is very clear that those rules apply to civil cases only. We have by the statute jurisdiction in error over any judgment; and there is nothing to prevent the prisoner from assigning errors; but it would be convenient, before the practice is settled, that the Crown should be represented.] *F. Russell*, for that purpose, prayed on behalf of the prisoner that he be remanded and ordered to be brought up on Monday 15th June, on which day counsel for the Crown would appear. Order accordingly.

On Monday, June 15th, the prisoner was again brought up by habeas corpus.(a)

F. Russell, for the prisoner.—It is suggested that the most convenient course would be to make the practice of this Court correspond to that of the Queen's Bench.

Welsby, for the Crown.—That seems to be the most convenient course. The Court has now to create a practice in the Exchequer Chamber; and it is very *desirable that the practice in error in criminal [*87 cases should be the same in both Courts of error.

COCKBURN, C. J.—Let it be done according to the practice in error in the Queen's Bench.

The prisoner then assigned in person the same errors as were assigned in the Court of Queen's Bench, in the same manner. Joinder in error on the part of the Crown, ore tenus, instant. *F. Russell* was assigned as the prisoner's counsel. A concilium was ordered.

Russell then prayed the Court to fix a day for the argument. The practice in the Queen's Bench is, that the argument is to be not less than six days after the motion for the concilium.

COCKBURN, C. J.—Let the argument be upon Monday the 22d instant.

Welsby then prayed the Court to make an order that the prisoner be remanded and again brought up on that day to attend the argument.

COCKBURN, C. J.—Let the order be so made: but let the removal be to Maidstone gaol, that being, as we are informed, more convenient than a removal to Newgate.

The case was argued in the Exchequer Chamber in this Vacation.(b)

F. Russell, for the plaintiff in error.—The jurors have *been [*88 improperly set aside. That this, if so, is ground of error, appears from *Rex v. Edmonds*, 4 B. & Ald. 471 (E. C. L. R. vol. 6), *Gray v. The Queen*, 11 Cl. & F. 427, *O'Connell v. The Queen*, 11 Cl. & F. 155, 351; in which last case, though it was not decided by the House of Lords whether the challenge (which was to the array) ought to have been allowed, it was never questioned that, if it was improperly disallowed,

(a) Before Cockburn, C. J., Cresswell, Williams, and Willes, Js., and Martin, Bramwell, Watson, and Channell, Bs.

(b) June 22d and June 23d, 1857. Before Cockburn, C. J., Williams and Willes, Js., and Bramwell, Watson, and Channell, Bs.

that was ground of error. To the same effect are *Moor v. Vaughan*, Cro. Eliz. 430, and a dictum in *Elynton's Case*, Yearb. M. 2 H. 4, pl. 7, fol. 3 A. B.

As to the case of *Iremonger*. When he was called the second time he should either have been sworn, or challenged for cause, because, in the legal sense of the word, the panel had before been gone through. This is not a matter in the discretion of the Judge. By 4 stat. 33 Ed. 1, it is enacted: "*quòd de cætero licet per ipsos qui pro domino rege sequuntur dicatur quòd juratores inquisitionum illarum seu aliqui illorum non sunt boni pro rege non propter hoc remaneant inquisitiones illæ capiendæ sed si illi qui sequuntur pro rege aliquos juratorum illorum calumpniati fuerint assignent certam causam calumpniæ suæ et inquiratur veritas illius calumpniæ secundum consuetudinem cur' et procedatur ad captionem illarum inquisitionum prout compertum fuerit si calumpniæ veræ sint necne juxta discretionem Justic'.*" That is, according to the translation, which may perhaps be dated as far back as 1534 (4 Reeves's Hist. E. L. c. 30, p. 424, 2d ed.), "if they that sue for the King will challenge any of those jurors, they shall assign of their challenge a cause certain;" which words are repeated in stat. 6 G. 4, c. 50, s. 29. *89] There is no *recital to 4 stat. 33 Ed. 1: if there were, it would probably be of the injustice which a contrary practice caused to the subject. [COCKBURN, C. J.—The earlier part of the enactment supplies a recital of the mischief intended to be remedied: "such inquests shall not remain untaken for that cause;" that is, for the allegation that the jurors, or some of them, are not indifferent for the King.] The later part of the enactment goes further: two evils were to be remedied: the delay of trial and the want of a fair jury; the truth of the cause assigned by the Crown is to be tried. The earliest authority which has been found on the interpretation of this statute is in Staundforde's work (said by Parke, B., to have been written in the early part of the reign of Elizabeth(a)), *Les Pleees del Coron*, Lib. III., cap. 7, fol. 162. "*Per cest statut il semble que le common ley fuit, que le roy purroit aver challenge chescun des jurours peremptoyment sans aver assigne ascun cause de ceo, et per tiel challenge il serroit trahe maintenant, et ceo per la prerogative quel le comen ley aver doü a luy entre multes auters prerogatives, mes ceo fuit mischevous et nocive al subject, qui per tiel mesne suffroyt delayes infenitüt, et perdrait hors del jure, les plus sages et plus indifferent. Pur remedie du quel, cest estatute fuit fait, quel jeo nosma, et appella statut, entant que il fuit fait in pleine parliament, issint que puis cel statut, le roy ne doit challenger sinon per cause. Mais cel cause ne besoigne il a monstren maintenant sur son challenge (come un cõmon person ferra, sil soit partie vers le roy), mes a ceo monstren, quãt il ad peruse tout le panel.*" It is to be observed that Staundforde here states the common law professedly *90] as an inference drawn by himself *from the statute: and it may be questioned whether the supposed prerogative ever existed. It is well known that the statutes passed in the time of Edward 1, and in the reigns immediately preceding, were frequently directed to settling and declaring the existing law, not merely to introducing alterations: 2 Reeves's Hist. E. L. c. viii., p. 82 (2d ed.); Hale Hist. Com. L. ch. vii.,

p. 194 (6th ed.) (a) Lord Campbell, C. J., in the argument below, seemed to think the alleged privilege an abuse, inconsistent with the declaration in Magna Charta against the delay of justice. It is undoubtedly asserted to have been the old common law in Co. Lit. 156 b; but Lord Coke there seems to rely merely on Staundforde. (b) As to the practical exposition of the statute, declared by Staundforde, that the cause need not be shown on behalf of the Crown till the panel has been perused, the same doctrine is laid down in Hal. Pl. Cr., part ii. ch. 36 (vol. 2, p. 271, ed. 1800). An analogous law appears to have prevailed in civil cases; Finch's Law, B. 4, ch. 36 (p. 413, ed. 1750); Fitz. Gr. Ab. *Challenge*, pl. 81, fol. 174 a, citing Yearb. Pasch. 7 H. 4, pl. 7, fol. 41 B. (c): but, from Bro. Abr. *Challenge*, pl. 2, fol. 121 b, and pl. 86, fol. 124 b, it may be collected that the law as to this was not quite settled; Yearb. M. 37 H. 6, pl. 17, fol. 8 A, Pasch. 27 H. 8, pl. 7, fol. 2 B.; 21 Vin. Abr. 275, *Trial* (L. d), pl. 13; ib. 281, *Trial* (S. d), pl. 5. From the dictum at the end of Yearb. M. 37 H. 6, pl. 17, fol. 8 A., it appears that the defendant, in a criminal case, may make his peremptory challenges after the panel has been once perused. In Hal. Pl. Cr., *part ii., ch. 36 (vol. 2, p. 274, ed. 1800), it is said: [*91 "When a prisoner challengeth for cause, he ought to show his cause presently because it is the King's suit," (citing Yearb. M. 1 H. 5, pl. 1, fol. 10 B., and 38 Assiz. 22(d)), "but some books are, that he shall not show cause till the panel be perused" (citing 6 R. 2.(e)) The Crown has no right of peremptory challenge at all: it has only the privilege of requiring that particular jurors be not sworn till it is ascertained that there is not a full number without such jurors; which is done by going through the names on the panel: after that is done, the Crown can challenge for cause: Anonymous case in Ventris (1 Vent. 309); Fitzharris's Case, 8 How. St. Tr. 223, 335; Coningsmark's Case, 9 How. St. Tr. 1, 12; Lord Grey of Werk's Case, 9 How. St. Tr. 127, 128, S. C. T. Raym. 473, Skinn 81(g) (where the defendant challenged *toutz per avails*, that is, the whole panel to the bottom, in order to exhaust it, so that it might be perused, and that the Crown might be thereafter compelled to show cause for its challenges); Sir Richard Grahame's (Lord Preston) Case, 12 How. St. Tr. 645, 675; Cowper's Case, 13 How. St. Tr. 1105, 1108. In the argument below, the counsel for the Crown relied upon Cook's Case, 13 How. St. Tr. 311, 317. There the clerk of arraigns had gone through the panel; and, a sufficient number not having been unchallenged and sworn, he proceeded to call over the defaulters. The first so called *was one Thomas Clark. The counsel for the prisoner inquired [*92 whether he had been present when he was first called, and insisted that there was a default of jurors; Treby, C. J., said: "Nobody is recorded absolutely a defaulter, if he comes in time enough to be sworn;" but, soon after, he added: "Where there is an apparent default of

(a) Reference was made, in the argument below, to Lord Campbell's *Lives of the Lord Chancellors*, chapters 9, 10, and Bracton, lib. 1, c. 1. s. 3.

(b) 2 Inst. 431 was referred to in the argument below.

(c) See Yearb. T. 7 H. 4, pl. 4, fol. 46 A.

(d) This reference appears to be inaccurate. See Fitz. Gr. Abr. *Challenge*, pl. 123, fol. 175 b.

(e) Fitz. Gr. Abr. *Challenge*, pl. 105, fol. 174 b.

(g) It is to be observed that this was not a case of felony, or high treason, or misprision of treason; and the prisoner therefore had no peremptory challenge. His attempt was defeated by his being called on to show cause, which he could not do.

jurors, then they" (i. e. the counsel for the Crown) "must show their cause: but here his appearance, it seems, was recorded, and so he was no defaulter; and you might have challenged him for cause still." Clark was, in fact, not a defaulter at all: (a) if he had been so, he would not have been called again. (b) In the present case, the power of the Crown to order a juror to stand by, was gone the moment the panel was exhausted: and that was clearly the case when Iremonger was called the second time. And, with respect to ancient precedents, it may be remarked that they are a safe guide where the decision has been against the Crown, but not so when it has been in favour of the Crown, the bias having been so strong for the Crown, even after the Revolution, as may be seen for instance in Charnock's Case, of which an account is given in Macaulay's History of England. (c) It should seem that, in Cook's Case, 13 How. St. Tr. 311, 317, the counsel for the prisoner demanded that, there being a supposed default of jurors, the Crown should be put to show cause of their challenging the first name, Simmons, who had been challenged for the Crown. That was refused, on the ground that *93] there was no default. But that at the utmost shows *only that all defaulters should be called over before the Crown can be called upon to show cause. Here Iremonger had not been a defaulter: yet, there being an insufficient number left on the panel, which had already been perused, he was ordered to stand aside without cause shown. That was manifestly contrary to the rule which has been shown to be established by the authorities; to which may be added Hawk. Pl. Cr. B. ii. c. 43, sects. 2, 3 (vol. 4, p. 388, 7th ed.), Horne Tooke's Case, 25 How. St. Tr. 1, 23, O'Coigley's Case, 26 How. St. Tr. 1191, 1231, Regina v. Cropper, 2 Moo. Cr. Ca. 18, 20, Regina v. Geach, 9 Car. & P. 499, 500, 501 (E. C. L. R. vol. 38). (d) From the last case, and from Regina v. Blakeman, 3 Car. & K. 97, it appears that the proper course, after the first perusal of the panel, is to call over, not merely the defaulters, but the whole panel, with the omission of those already challenged for the prisoner. [COCKBURN, C. J.—If the panel has been perused, and found insufficient, is it so exhausted that absent jurors may not be sent for, as from the other Court?] The word "exhausted" will not be found in the authorities on this subject: but probably it would, in such a case, be held that jurymen who had so come into court might be called over as part of the first perusing of the panel. But here the second reading of the panel had commenced. The twelve jurors who afterwards came into court, stood in the position either of defaulters or of jurors already properly excused. [COCKBURN, C. J.—Suppose a jurymen were leaving *94] the court, but were called back upon an *officer pointing him out; or that the court had indulged a juror who had a trifling indisposition by allowing him to go: could not such jurors be called back and treated as if they were regularly called upon at the first reading?] The cases put are not cases of jurors properly excused. But, if jurors were properly excused, as for insanity, they could not be afterwards called. It seems that the law as to this ought to be as definite and strict as the

(a) 13 How. St. Tr. 313.

(b) See, however, 13 How. St. Tr. 317, and Laver's Case, 16 How. St. Tr. 93, 130.

(c) Ch. xxi. (vol. 7, p. 302, ed. 1858).

(d) See also Anonymous Case in 1 And. 299, pl. 307; 4 Bl. Com. 353; 4 Bac. Abr. 571 (7th ed.), tit. *Juries* (E) 10; Joy On the Admissibility of Confessions and Challenge of Jurors 143; Rex v. Badcock, 2 Gude's Practice 193.

law against a jury being discharged or departing before verdict, when once charged with a defendant indicted for felony: 4 Bl. Comm. 360; Co. Lit. 227 b; Hawk. Pl. Cr., B. ii. c. 47 (vol. 4, p. 459, 7th ed.). The privilege allowed to the Crown is not founded on any general principle; it is a matter of positive law, and must be limited by exact rules. [WILLES, J., inquired whether the court of error could review the proceeding of the court below in a matter of practice: and he referred to *Mellish v. Richardson*, 1 Cl. & F. 224.] There is no other mode of redress. The record shows an "award in nature of a judgment," upon which there may be error: Co. Lit. 288 b. Thus in *Arundel's Case*, 6 Rep. 14 a, judgment was arrested, in a case of murder, because the jury had been taken from the wrong visne. [COCKBURN, C. J.—But here the judgment, if it be one, is not awarded till after the additional jurors have come in.] The question is, what the court ought to have done when the Crown required the juror to stand by, and the prisoner's counsel objected to that. The modern practice has, in effect, much enlarged the privileges of the Crown. Formerly, there were ordinarily forty-eight jurors (four juries) summoned, and the prisoner had the right to challenge *peremptorily thirty-five (that is, any number short of *95 three juries); so that the Crown could challenge one only; 4 Bac. [*95 Abr. 569 (7th ed.), tit. *Juries* (E) 9; 4 Bl. Comm. 354: but now the prisoner's peremptory challenges are restricted to twenty, and the number of jurors summoned is very much increased. This privilege can hardly be considered as conducive to justice: it does not exist to anything like the same extent in other countries.(a) The language of the court below would seem to allow a peremptory challenge, properly so called, to the Crown, which is in express contravention of 4 stat. 33 Ed. 1. [BRAMWELL, B.—But, as to what took place at the trial, are you entitled to assume that the counsel for the Crown might not apply to the discretion of the judge, and request him to order a juror to stand by, that it might be ascertained whether there were not a sufficiency of jurors to whom there was no objection?] The books show no trace of the judge being intrusted with such a discretion. [COCKBURN, C. J.—Suppose the judge thought that the order in which the panel was arrayed was prejudicial to the prisoners: could he not order the names to be taken by ballot?] There is no trace of such a power: in *Frost's case*(b) it was done by consent, the Court showing some reluctance. The legal remedy is of another kind. The balloting is a modern practice, which seems to have arisen from stat. 6 G. 4, c. 50, s. 26.(c) [Mr. *Straight*, the deputy clerk of assize on the Home Circuit and one of the clerks of arraigns at the Central Criminal Court, stated that, at *the Central Criminal Court, [*96 the practice is to have the panel divided between the different courts every day, which is not done in the presence of the prisoner.]

Secondly, the direction of the judge, that the jurors should "stand by," was erroneous. No such proceeding or term is technically known to the English Law. The proper word is "challenge." That is a word of art, as appears from Co. Litt. 155 b; and it is found accordingly in 4 Chitty's Cr. L. 310, as to the array; and in *Rex v. Badcock*, 2 Gude's

(a) In the argument below Forsyth's History of Trial by Jury, p. 208, &c., was cited as to the law of Jersey. See ib. p. 175, &c., and p. 230, &c.

(b) Trial of John Frost, p. 31. London, 1840.

(c) See stat. 3 G. 2, c. 25, s. 11.

Pr. 193, as to the poll; the form in this last case is in the MS. Precedent Book in the Crown Office; and a similar form appears in 2 Gude's Pr. 194 (cited in Joy On the Admissibility of Confessions and Challenge of Jurors, &c., p. 146, note (a)). Even if such a phrase could have a legal meaning on the record, it ought to appear that the juror was ordered to stand by only till it appeared that there was not, or was, a sufficient number without him. The words seem to have been imported from the Irish law: the practice of ordering a "juror to stand by until the panel shall be gone through, at the prayer of them that prosecute for the King," is preserved to the Irish Courts by stat. 9 G. 4, c. 54, s. 9.

Next, the jurors ought to have been called in the order in which they stood on the panel. "The jurors' names are ranked in the panel one under another; which order or ranking the jury is called the array, and the verb, to array the jury:" Co. Lit. 156 a. In Wharton's Case, Yelv. 23, where it became necessary to read over the panel of jurors a second time, "it was agreed they should be sworn as they stand in the panel *97] without having *respect to those who were sworn at first:" which case is cited in Hal. Pl. Cr., part ii., ch. 36 (vol. 2, p. 274). In Rex v. Johnson, 2 Str. 1000, it is assumed that the sheriff has the "power of marshalling;" which looks as if, when the arrangement is once made, it cannot be departed from. [Mr. *Straight* stated that at the Central Criminal Court the officer commenced reading the names sometimes from the top and sometimes from the middle of the panel, as well in cases of indictment for murder as in others.] The contrary seems to have been assumed in Frost's Case, p. 31; and in Horne Tooke's Case, 25 How. St. Tr. 15, &c., it appears that the jurors were called over in the order in which they stood on the panel; and in Regina v. Geach, 9 Car. & P. 501 (E. C. L. R. vol. 38), Parke, B., says that the panel should be called over "in the same order as before, calling those who did not answer before, and omitting to call those who have been already peremptorily challenged for the prisoner." [COCKBURN, C. J.—I do not know that we can infer from that more than that Parke, B., in the particular case, thought that a convenient mode of proceeding.] A power of varying the order seems as dangerous to the prisoner as an improper allowance or disallowance of challenges.

Next, Jabez Philpott, having been "elected and tried," ought to have been sworn. In Camden and Symmon's Case, Godb. 234, &c., it is said, "That where a juror is not challenged by one party, who had sufficient cause of challenge; and afterwards is challenged by the other side, and afterwards the party doth release his challenge; in that case, the first party cannot challenge the same juror again, because he did foreslow *98] his time of challenge, and he had *admitted the party for to be indifferent at the first." A juror once found indifferent cannot be tried on a challenge again; 21 Vin. Abr. 281, tit. *Trial* (S. d), pl. 5, citing Bro. Abr. *Challenge*, pl. 4, fol. 121 b.(a) The same doctrine is laid down in Wharton's Case, Yelv. 23. In Brunt's Case, 33 How. St. Tr. 1178, a juryman prayed to be excused, on the ground of his mind having been prejudiced by his having acted as a juror in a trial arising from the same transactions (the Cato Street conspiracy): but the Court ruled that he could not be discharged unless the parties objected; and

(a) Who cites Yearb. T. 27 H. 8, pl. 10, fol. 21 A.

he was sworn. The law has always been very jealous of intrusting such a power to judges. Even the excusing jurors from ill health is matter of positive enactment; Stat. West., the Second (1 stat. 13 Ed. 1) c. 38: and the strictness with which jurors were watched appears from 1 stat. 38 Ed. 3, c. 12. In an Anonymous case in Brownlow, (a) a juror prayed to be discharged because he was eighty years old: but the Court held that this could not be done without consent; else there would be error. In *Rex v. Stone*, 6 T. R. 527, the Court would not even allow the jury to withdraw for refreshment, and the Court to adjourn; without much deliberation; and a special entry was made, stating the case to be one of necessity: and the express enactment of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), sect 19, shows how limited the common law power of the Judges was in this respect. (b)

*Further: the record does not show that the sheriff returned good and lawful men of the county of Kent to try the issue. The Court below presumed this, from his having been ordered so to do: but such presumption cannot be made to support jurisdiction. That was the opinion of Patteson, J., in *Whitehead v. The Queen*, 7 Q. B. 582 (E. C. L. R. vol. 58). The necessity for the qualification of the jurors returned by the sheriff appears from Hal. Pl. Cr., Part 2, ch. 34 (vol. 2, p. 264). In *Rex v. Mashiter*, 6 A. & E. 153 (E. C. L. R. vol. 33), a relator in quo warranto complained that the votes of "inhabitants" had been rejected, contrary to charter; but it was held that this was insufficient without showing fully the meaning of the word "inhabitants" in the charter.

Welsby, for the Crown.—The first point to be considered is, whether any of the matters as to which errors are assigned appear on this record as such judgments as can be reviewed in error. The proper mode of raising an issue as to the allowance or disallowance of a challenge is by demurrer or by counter-plea: *Rex v. Edmonds*, 4 B. & Ald. 471 (E. C. L. R. vol. 6). [COCKBURN, C. J.—The complaint here is that the Judge interfering, improperly it is said, prevented the due course of challenge, and so deprived the prisoner of the opportunity of demurring or counter-pleading.] All previous to the formal challenge is matter of practice and discretion, which ought not to appear on the record. If at a trial the presiding Judge exercises his discretion in a matter of practice mistakenly so as to prejudice, it is a matter for an application for equitable interference; if he does wrong intentionally it is a ground for impeachment; but in neither case is it a ground of error. The Judge must exercise his discretion as to whether the trial shall be postponed, as to whether there shall be an adjournment, and many similar matters on which a wrong decision might be as fatal to the interests of justice as a wrong decision on the proper order in which the panel shall be called, or on the proper time at which a challenge shall be made; but none of these matters ought to appear on the record; and improperly putting them on the record cannot make them matter of error. In all such cases the decision, right or wrong, is final. The prisoner is not more without a remedy than he is if the Judge misdirects the jury in a case where a bill of exceptions does not lie. If the challenge, being

(a) 1 Broul. & G. 41.

(b) In the argument below, reference was made to 3 Bl. Com. 361, and to Lord Hale's remarks, in Hal. Pl. Cr. Part 2, ch. 42 (vol. 2, p. 311), on the practice of fining jurors for finding verdicts contrary to evidence; and to *Bushell's Case*, Vaugh. 135.

made without cause, is demurred to, or if there is a counter-plea, the decision is one on which error may be brought. Such was the case of *Gray v. The Queen*, 11 Cl. & F. 427; but such is not the course adopted here. Assuming, however, that this Court can review what was done at the trial, all was correctly done. The Jury Act (6 G. 4, c. 50, s. 23) re-enacts without alteration the ancient statute. On the construction of that ancient Act all the cases and all the text-books concur. The mischief which the statute was intended to remedy was, that by the excessive exercise of the unlimited right of challenge on the part of the Crown the panel was exhausted and trials went off for want of jurors; and therefore the Crown is required to assign cause when the panel is exhausted, and not till then. The question therefore is, when is the panel exhausted? The argument for the prisoner is that it is exhausted *101] as soon as any name on the panel is pronounced a second time; but the reason of the thing, as well as the course of decision, shows that it is not till all reasonable means of getting the jurors have been finished, not until it appears that the trial must be postponed for want of jurors unless the persons set aside by the Crown are called upon: *Cook's Case*, 13 How. St. Tr. 311, 318; *Lord Preston's Case*, 12 How. St. Tr. 645, 675; *O'Coigly's Case*, 26 How. St. Tr. 1191, 1240. In that latter case, Buller, J., explains the previous cases. In *Horne Tooke's Case*, 25 How. St. Tr. 1, 21, when the panel had been gone over the defaulters were called before the Crown was put to show cause. In *Regina v. Geach*, 9 Car. & P. 499, 501 (E. C. L. R. vol. 38), Parke, B., is reported as saying: "The proper course will be to call the panel over in the same order as before, calling those who did not answer before, and omitting to call those who have been already peremptorily challenged by the prisoner." It does not appear by the report what was done; and it is difficult to believe that the very learned Baron should pursue a course so different from that which appears by *Horne Tooke's Case* to have always been pursued, viz., to call only the defaulters the second time. If he did do so, he infringed upon the rights of the Crown. A little later in the report, a juror coming in, the learned Judge is reported as saying: "The prisoner having now challenged his full number peremptorily, if this person is challenged on either side, it can only be for cause." [WILLES, J.—The Crown had already challenged other jurors for cause. I understand that to be the reason of this decision: the panel had been exhausted; and the challenges for cause began before that juror came in.] Probably such was the case; the report is *102] too loose to afford any certain information. If the panel had been exhausted when Iremonger's name was reached, he ought to have been challenged for cause; but no authority cited shows that it was exhausted: the twelve jurors who had just come into Court were available; and there was no reason why they should not be sworn. It is true that Iremonger's name had been pronounced, and that he had stepped into the box; he very soon would have come to the book to be sworn, which is the right time for the challenge; but that time had not arrived. Then, as to the other objections. The phrase "stand by" is not a term of art; but its meaning is plain. The counsel for the Crown requests that he may not yet be called upon to challenge this juror, and that till the proper time comes the juror may stand by; and that was his right as representing the Crown. And no error can be assigned

in consequence of the mode in which the panel is called: that is mere matter of practice; and, as is well known, the practice is different at the Old Bailey and on the Assizes. The ordinary practice of the particular Court should be adhered to, unless for good reason; but, if deviated from, even wrongly, it is not matter of error. As to Philpott, he was ordered to stand by at the instance of the counsel for the Crown. The conversation before he was so set aside is quite irrelevant, and ought not to have been put on the record. If there was anything in the objection to the mode in which the jury process is stated on the record, it might be amended; *Mellish v. Richardson*, 1 Cl. & F. 224: but it is correct.

F. Russell, in reply.—The prisoner has a right to have *the [*103 real facts put upon the record, and, having done so, to have the opinion of the Court of Error upon them. [BRAMWELL, B.—The Court of Exchequer Chamber thought not, in *Alleyne v. The Queen*, 5 E. & B. 399 (E. C. L. R. vol. 85).]

COCKBURN, C. J.—I am of opinion that the judgment of the Court of Queen's Bench must be affirmed. It has been contended that the grounds of exception here are not properly the subject of error. I think it unnecessary to decide that question, being of opinion that all that was done at the trial was right: and, though it may be doubtful whether error lies, it is not, in my opinion, judicious to decide this now. I am unwilling, by an unnecessary decision, possibly to abridge the rights of the subject. I deal therefore solely with the merits. The first objection is this. It appears that, after the list of jurors had been gone through, and after several persons on answering to their names had been set aside by the Crown, twelve of the persons on the panel came into court. The names of those twelve had previously been passed over, it being known that they had retired as a jury. At this time the name of Iremonger, the first of those who had been ordered to stand aside, had been called a second time, with a view to seeing if the Crown would challenge him for cause; and he had answered. Instead of proceeding at once to try whether the Crown would challenge Iremonger for cause, the judge, on the application of the counsel for the Crown, ordered him to stand aside until the names of the twelve who had just come into court were called. The question, whether this was right or not, depends upon the construction *of stat. 6 G. 4, c. 50, s. 29, repealing and re-enacting 4 stat. 33 Ed. 1. It appears that, before 4 stat. 33 Ed. 1, the Crown, [*104 either by prerogative or by usurpation, exercised the power of peremptory challenge without restriction as to number: and, if that power was exercised so that twelve jurors did not remain, the inquest went off for that cause. To meet this evil the Act was passed. On the enactment a practice was grafted by which, on the counsel for the Crown intimating his intention to challenge one of the jurors, he was not put to assign cause at once, but the juror was set aside until the panel was gone through to ascertain if enough of persons not objected to might not be found to make a jury. If the panel was large, this in effect was equivalent to a peremptory challenge. In one of the early state trials, *Fitzharris's Case*, 8 How. St. Tr. 243, 335, the Chief Justice uses language as if, in practice at that time, this privilege was not confined to the Crown, but that either side might set aside the juror and afterwards take their exceptions. But, be that as it may, it must be

admitted by every one that it is now settled by overwhelming authority that, where it is proposed to object to a juror, the counsel for the Crown have the right to have the man set aside until it is seen if without him there will be jurors enough to try the prisoner, and that it is not until the panel is gone through that cause need be shown. That being so, the question is reduced to this, When is the panel gone through? Is it as soon as the names have been called over? Or is it not until every proper attempt has been made to secure the presence of those on the panel whose duty it is to attend? In the present case the panel had *105] been called over, properly *omitting the names of twelve who were known to be justifiably absent, the calling of whose names would have been an idle ceremony; and enough persons did not remain to form a jury. Iremonger's name is again called; and before anything more is done the twelve absent jurymen come in. It is not disputed that they were duly qualified jurymen and on the list: but it is contended that, the list having been once gone through, it must be gone through again in the same order as before. But, it being conceded that the Crown is not put to show cause for its challenge till the panel is gone through, it seems to me very clear that the panel was not gone through till those twelve names of available jurymen were called. It is, however, said that, Iremonger having been called, his challenge should have been disposed of before these names were called. There would have been some difficulty about this if the challenging had been commenced, as if some previous challenge for cause had been tried, though even then I do not think there would have been a matter of right. But here it is clear that no challenge had begun: and before the Crown could be put to challenge and show cause the names of all the defaulters should have been called over. Independently of the reason, there is high authority for that. In *Horne Tooke's Case*, 25 How. St. Tr. 1, 26, the Attorney-General states, and *Ersine* for the prisoner does not deny, that it is the course of practice to call the defaulters. That was, in substance, done here; the twelve had not been called because it was known that they were absent: when they came in it was a proper and legitimate course to call their names over. The report of *Regina v. Geach*, 9 Car. & P. 499 (E. C. L. R. vol. 38), is *very loose, and *106] cannot be depended upon. I infer, however, that *Parke, B.*, did not in that case follow the practice of calling the defaulters separately, which I clearly think the better and more convenient course. But I do not understand from the report that *Parke, B.*, thought that he was bound to call the panel over again in the same order as before. He seems to have thought it a matter of practice on which he might pursue that course which was convenient. It is then objected that the Judge ordered that *Iremonger* should stand by. That is not a term of art, though not wholly unknown to the law. We must look to the whole record to see what it means. And, doing so, it plainly means that the Judge directed him to wait till the proper time should arrive for assigning cause; and that was a proper direction. Then complaint is made that the jurors were not called in proper order. They were all called except the twelve who were known properly to be absent. To have called their names would have been idle unless the first objection had been well founded, and the names being once called over the Crown was driven to challenge for cause. But, as I have already said, I think the

Crown is entitled to have all qualified persons whose service is available called before it is put to challenge for cause. Then comes the case of *Phillpott*. He, it seems, was about to be sworn. Now it is to be remembered that, as the common notice, given by the officer, shows, the time for the challenge is as they come to the book to be sworn and before they are sworn. Up to that time both the Crown and the prisoner have the right of challenge; and, if cause is discovered at the very instant when the oath is about to be taken, the juror may be challenged for cause. Now I am very far from saying that, if a Judge discovers an objection to a juror, *he may not of his own mere motion direct him to withdraw: but it is not necessary to decide [*107 that he may do so; for in this case it was not done. Before the juror was sworn, the counsel for the Crown, in the exercise of his undoubted right, desired that he might stand aside; and the Judge properly directed that he should do so. Lastly, it is said that it does not appear that the jurors were good and lawful men. But, if they had not been so, it might have been made the ground of challenge: and after verdict we must presume that the sheriff did his duty.

WILLES, J.—I am of the same opinion. It is not necessary to decide the question whether these matters ought to have appeared on the record, or whether a Court of Error can inquire into them. Should it ever be material to decide that point, the counsel who have to argue the case will do well to search for precedents. In the case of *Gray v. The Queen*, 11 Cl. & F. 427, the question was raised upon a demurrer. The record appears in the report of the case in the *Irish Queen's Bench*, *Regina v. Gray*, 6 Irish Law Reports 259,(a) where there are some remarks of one of the Irish Judges, for whose opinion I have great respect, as to the duty of a Court of Error to review all matters when put on the record. I should require more research than I have bestowed before I differed from him. My impression is, however, the other way: and I think an opposite doctrine appears from *Rex v. The City of Worcester*, *Skinner* 101, where it is said by *Saunders*, C. J., that, if a challenge be taken and overruled on demurrer, it is entered upon the original record; "but if the Judge overruled the challenge upon debate, without a demurrer, then 'tis proper *for a bill of exceptions." [*108 In cases where a bill of exceptions does not lie it would seem from that that it could not be brought into error. But, entirely concurring with the Lord Chief Justice as to the rest of the case, I abstain from forming any judgment on a point which it is not necessary to decide, and before deciding which I should require more opportunity for research than I have yet had.

On the merits, assuming that it is competent for us to look at them, I have no doubt. The great question is as to the time when the Crown is to be put to show cause. That depends on the construction of 4 stat. 33 Ed. 1, re-enacted in the same words by stat. 6 G. 4, c. 40, s. 29. The words of that ancient Act, "non propter hoc remaneant inquisitiones illæ capiendæ," received a construction soon after it passed, which, as early as the time of *Staundforde*, had become inveterate. In the first edition of *Staundforde's Pleas of the Crown* (published in 1583), p. 162 b, I find it laid down that under this statute the Crown is not bound, as a

common person would be, to show the cause of challenge at once, "mes a ceo monstrer, quant il ad peruse tout le panel." To understand what is meant by perusing the panel we must look to the practice of the Courts. It cannot reasonably mean merely "reading the panel." In a secondary sense the word "perused" might mean "carefully examined;" but in practice the course has always been that stated in 4 Blackst. Com. 353: "The king need not assign his cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the person so challenged. And then, and not sooner, the king's counsel must show the cause: otherwise the juror shall be sworn." In the case at bar there had been challenges *109] by the Crown; and the panel had been gone through as far as the jurors were in Court; and the first of those challenged for the Crown, against whom the Crown at the proper time must assign cause, was again presented. Whilst the discussion whether that proper period had arrived was still pending, twelve jurors, whose names had not been called because it was known they were properly absent, came into Court. The Judge decided that till these were called the panel had not been perused. The statement of the facts is the best answer to the objection to this decision. Twelve jurors were in Court whose names had not been called. I look upon the request by the counsel for the Crown, that Iremonger should stand aside, as a continuation of his former request, not as a fresh challenge requiring cause. Then several minor objections are raised to support this chief one. I do not think *stand by* is a term of art; the phrase in more common use has been *set by*. Nor is challenge a term of art which must be used. It is incumbent on those who say that any word is a term of art, for which no equivalent can be substituted, to show that it has been so held; and here that is not shown. Then the question mooted, as to whether a Judge has of his own motion power to set aside a juror, on a ground rendering him unfit to act as a juror, seems to me one of great importance. I must for myself protest against its being supposed he has not such power. In the present case it appears that the juror had a conscientious objection to capital punishment. That would be no objection to his being a juror if he was still prepared to give an honest verdict according to the evidence: but, if the meaning was that he had objections to find a verdict of Guilty though according to the evidence, it *110] would be a ground of challenge; and, in my opinion, on the Judge's own motion he would be justified in preventing what would be a mere mockery, the swearing of such a person on the jury. I do not wish to be understood as expressing a final opinion on a subject which does not arise; but I own I have a strong one. I do not draw the same inference as to the ancient practice which my Lord Chief Justice draws from expressions in Fitzharris's Case, 8 How. St. Tr. 243, 335: but it is not necessary to discuss that, as all agree that the practice is now firmly established and to be acted upon. Then the order in which the panel is to be called cannot be matter of law. I agree that the ordinary practice of the particular Court in this respect should not be departed from; but I do not see that it was. It was right to call the names of the twelve jurors who had been absent from Court, as soon as they came in. Lastly, it is said that it does not appear that the jury were good and lawful men. But, if the jurors were not qualified, it is,

since stat. 6 G. 4, c. 50, s. 27, a ground of challenge: and what is ground for challenge is not ground for a new trial: *Rex v. Sutton*, 8 B. & C. 417 (E. C. L. R. vol. 15). It is not suggested that anything injurious to the prisoner did in fact take place: if it had, it would be a ground for an application, not to us, but elsewhere.

BRAMWELL, B.—I am of the same opinion. I must remark that, in my mind, the questions, whether what was done was right, and whether what was done is examinable in error, are so mixed up that I cannot express an opinion on the one without the other: and, lest it should be supposed that I approved of the form *of this record because it [111] was settled before me, I wish to say that I am of opinion those matters ought not to appear on the record. Looking at the words of the ancient Act, I should have thought the intention was that the Crown should not challenge at all without cause. If the Act had been passed recently, I should have said that at a trial it was a reasonable request on the part of the counsel for either the Crown or the party to ask that a juror whom he objected to might stand aside till it was seen whether a full jury of persons, to whom there was no objection on either side, could be obtained without him. And I should have thought the Judge might postpone the time for the assignment of cause for either side, not as a matter of right, but as a reasonable exercise of his discretion. But the Act was passed five hundred years ago; and the uniform course of proceeding for centuries has settled that the Crown has a right to require the Judge to set aside any juror till the panel is perused. Consistently with this, I think the Judge may in his discretion, for sufficient cause, further postpone the time of assigning cause, either for the Crown or of the prisoner, but not as a matter of right on a mere request without sufficient cause. I think the sufficiency of such cause a matter for his discretion: and, like every other matter which is to be decided according to discretion, it ought not to appear upon the record, and is not examinable in error. But, supposing that it were examinable in error, I concur in thinking what was done was rightly done. Very little weight is to be attached to the opinion I formed at the Assizes; for the subject was new to me. I was forced to follow what seemed to me the dictates of common sense, with such assistance as I could get from the experienced officer of *the Court. But now I think the course pursued was [112] right. The only sensible limit as to the time when cause is to be assigned is when the panel is so gone through that, without the persons objected to, a full jury cannot be obtained. The words used by the text writers are capable of more meanings than one. Good sense says that they must be construed as meaning that the Crown is not to be put to show cause till the time has come when, if not put to show cause, the trial will go off for want of jurors. I think therefore that, even if the twelve whose names had not been called over had not come into Court when they did, it might have been right to set aside Iremonger for a longer time, as long as there was reasonable ground for thinking that any one might be brought into Court who was liable to serve, and had not yet been objected to. Otherwise, suppose the case of a man known to be present, but not to have answered when his name was called; or suppose it came to be a ludicrous contest as to who should answer first. The true rule is, to postpone the time for assigning cause till all reasonable endeavours to make all answer who ought to answer

have been exhausted. Then, if twelve jurors have not been obtained, the Crown must show cause, but not till then. If at the trial I had had *Rogina v. Geach*, 9 Car. & P. 499 (E. C. L. R. vol. 38), brought to my notice, I do not think I should have had courage to depart from the course taken by Baron Parke; but, after all, he never says that the course he takes is the only one; only that it is a convenient course. With regard to Philpott, I think a Judge ought to have power to set aside a man in such *113] a case: but no such power was *exercised here. There could hardly be a better illustration of the inconvenience of putting on the record matters as to an exercise of the discretion of the Judge than is afforded by that objection; for in truth there was no ground for supposing the prisoner suffered the least hardship on that account.

WATSON, B.—I am of the same opinion. I own I have a strong opinion that these points are not examinable in error on this record; for in every precedent which I can find the points in error were raised by demurrer, counter-plea or traverse, not as here: but I am glad that our judgment does not rest on that. It turns on the meaning of the Act of Edward 3. It could not be denied that, by a series of decisions before and after the time of Staundforde, it is settled that the Crown is not bound to assign cause till the panel has been perused. It is impossible now to contend that such is not the true construction of the Act. Had, then, the panel been perused in this case? I think not. The twelve jurors out of Court had not been called; nor had the challenge of Iremonger begun. A challenge is a formal thing, which must be done in such a manner as to give the prisoner the opportunity to counter-plead or demur. That had not been done. Then, had the panel been perused, gone through, or exhausted? I think not. If I wanted authority for this, which I do not, I think *Cook's Case*, 13 How. St. Tr. 311, 318, and *Horne Tooke's Case*, 25 How. St. Tr. 1, 23, are authorities for what is clear on principle. It is said the jurors were not called in their *114] proper order. I quite agree the *panel in each Court should be called as is usual in that Court. The course is not the same at the Old Bailey and at the Assizes; and at each place the panel should be called in the customary way there; but, where a person has been called and has not answered, if he afterwards does answer before the formal challenges commence, it shows that the panel is not yet exhausted. As to Philpott, the man who had what are called conscientious objections, the facts are such as to raise no point at all. He had stepped into the box; but, before he came to the book to be sworn, he was set aside. But I do not wish it to be supposed that I doubt that, if a Judge sees that injustice is likely to be done, either against the Crown or against the prisoner, he may interfere to prevent it. I think that, if he perceives that the juror is incapable of trying the cause, either from mental or physical infirmity, the Judge may and ought to interfere. I, however, give no final opinion on this last point, as it is not raised before us.

CHANNELL, B.—As this is a case of life and death, I shall state the principal reasons why I also think that the judgment should be affirmed. I have entertained great doubts as to whether we can properly entertain these questions; as to some of the objections I have a strong opinion that we cannot. But I found my judgment on the ground that all that was done was substantially right. The main question is as to Iremonger;

for I think the course pursued as to him decided what was to be done as to Philpott. It turns on the construction of 4 stat. 33 Ed. 1, passed in 1305, more than 500 years ago, the provisions of which have been *re-enacted in the same words. The object of that enactment was, as I conceive, to prevent the indefinite adjournment of [*115 inquests, on the suggestion of the Crown that the jurors were not indifferent. We are to construe this old Act by the aid of the decisions, reading it with the assistance of what has been done since in course of law. It is clear, then, that till the panel is exhausted, and it is seen that a full jury cannot be obtained, the Crown has a right to ask to have a juror to stand by: and, whether this is properly called a challenge or not, the course said on the record to have been adopted at the trial was right. The question is whether, when Iremonger was called a second time, the period had arrived at which the Crown was bound to assign cause. There had been no formal challenge, no decision; all relating to Iremonger was yet, as I may say, in fieri, when the twelve jurors who had been absent came in, having fulfilled their duty. I cannot attach any importance to the mere commencement of the discussion about Iremonger's challenge. Had anything been decided, a very different case would have arisen. As it was, the twelve came into Court in such time that both the prisoner and the Crown had a right to require their services. I say nothing as to the proper mode of going over the panel the second time; here the twelve had not been called at all; till they were, the panel clearly was not exhausted, and Iremonger was properly ordered to stand by till they were called. They were called; and one of them, Philpott, answered to his name. I concur in what has been said by the other Judges as to the propriety of a Judge having power to remove a man who has so conducted himself as to afford reasonable ground for believing he is unfit to fulfil the functions of a jurymen. I concur in *this as a matter of opinion: but I give my judgment [*116 on the ground that he was, at the prayer of the counsel for the Crown, set aside before the panel was exhausted.

COCKBURN, C. J.—My brother Williams, who has left the Court, desires it to be stated that he is of the same opinion.

Welsby.—Does the Court award execution?

COCKBURN, C. J.—We only affirm the judgment of the Queen's Bench. The former award of execution remains on the record, of which a transcript has been brought here. If there is no further respite, the law takes its course.

Judgment affirmed.(a)

(a) No formal record of the proceedings in the Court of Exchequer Chamber was drawn up. The prisoner was afterwards executed.

In the absence of any express statute on the subject, the common law rule that the prosecution in a criminal case cannot be required to show cause of challenge to a juror until the panel has been exhausted, has been generally adopted in the United States: *Commonwealth v. Joliffe*, 7 Watts 585; *U. S. v. Wilson*, 1 Baldwin 81; *State v. Archer*, 2 Dev. 217; *State v. Bratton*, 6 Iredell 164; *State v. Stalmaker*, 2 Brevard 1; see *Sealy v. State*, 1 Kelly Geo. 213. The practice here, as in England, is to have the jurors objected to on the part of the government, set aside until all the rest have been called. Where sufficient cause appears, the court may, of its own motion, and with-

out any challenge on the part of the be the subject of exception on behalf prosecution, set aside a juror who is of the prisoner: *Montague v. Com.*, incompetent; but the decision of the 10 Grattan 767.
court on such a case may, if erroneous,

THOMAS HOUGHTON HODGSON, Appellant, v. The Local Board of Health for the District of CARLISLE, Respondents. June 26.

Real property within the district of a Local Board of Health cannot be assessed to a district rate, unless there be some person having such an occupation as would make him liable to the poor-rate in respect thereof.

NOTICE of appeal against a district rate for the district of Carlisle having been given, a case was stated for the opinion of this Court. After stating that the district of Carlisle was duly constituted, and that *117] The Mayor, Aldermen, and Citizens of the City of Carlisle, *by their town council, were the Local Board of Health for the district, the case proceeded.

On the 9th October, 1855, the Local Board duly made a special district-rate for the purpose of defraying the expenses of making certain sewers for the benefit of the said district, and, on the 7th January, 1856, duly amended the said rate by assessing therein the occupier of the court-houses for the county of Cumberland in respect of the said court-houses. The said court-houses were built under the provisions of an Act, 47 G. 3, Sess. 2, c. xxxii.(a) They consist of two separate and substantial stone buildings situate in English Street, the principal street in the said city, and in the district for the benefit of which the expenses mentioned in the aforesaid special district-rate were incurred. They stand upon and include 1 rood 32 perches of ground, and have 100 yards of frontage on the several public streets of the said city by which they are bounded. They are used solely for the purposes of holding therein the Assizes, the Quarter Sessions of the Peace, and the public meetings of the justices of the peace of the said county, and the meetings for transacting the public affairs and business of the said county: and all the expenses thereof are paid by the inhabitants of the county out of the county-rate. Each building contains several rooms, of which the largest (the courts of justice) are each capable of holding 1000 persons, or thereabouts, assembled together. They also contain, amongst other offices, 8 water-closets or privies for the use of the persons who may be *118] assembled in the *said court-houses; and they are provided with fireplaces, chimneys, and furnaces for warming and ventilating the several apartments in the said buildings. The appellant is the clerk of the peace for the county of Cumberland, and, as such clerk of the peace, occupies offices in one of the said buildings for the transaction of the business of his said office of clerk of the peace. He also transacts private business as an attorney and solicitor, and is rated to the poor's-rate, and to the special district and other rates, on account of his

(a) Local and personal, public: "To enable His Majesty to grant the citadel and walls of the city of Carlisle, and certain grounds adjoining thereto, to the justices of the peace for the county of Cumberland, for building courts of justice for the said county, and for other purposes relating thereto."

beneficial occupation of the offices, separate and distinct from the court-houses generally; and against which rates upon his offices no appeal has been entered, and consequently no question arises. He is, however, for the purposes of the present case, to be deemed and taken to be the person liable to be rated, if any person or persons whatever is or are liable to be rated, in respect of the said court-houses or either of them. No rent or money or other payment has ever been made to, or profit made by, the said justices, or any one on their behalf, in respect of any part of the said court-houses, or in respect of the said offices so occupied by the clerk of the peace. The said court-houses have never been rated or assessed to the relief of the poor. The question for the opinion of the Court is, Whether the said court-houses were liable to be assessed to the said special district-rate made and amended as aforesaid.

If the Court shall be of opinion that the said court-houses are not liable to be assessed to the said special district-rate, then the said rate so made and amended as aforesaid is to be confirmed. But, if the Court shall be of opinion that the said court-houses were not liable to be assessed as last aforesaid, then the last-mentioned *special district-rate is to be further amended by striking out the assess- [*119 ment in respect of the said court-houses.

T. P. E. Thompson, in support of the rate.—The case depends upon the construction of The Public Health Act, 1848 (11 & 12 Vict. c. 63), sect. 88: "That the said special and general district-rates shall be made and levied upon the occupier (except in the cases hereinafter provided) of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor, and shall be assessed upon the full net annual value of such property ascertained by the rate (if any) for the relief of the poor made next before the making of the respective assessments under this Act." The court-houses are so occupied that no person can be rated to the relief of the poor in respect of his occupation; that must be admitted: *Regina v. The Justices of Worcestershire*, 11 A. & E. 57 (E. C. L. R. vol. 39); *Regina v. Overseers of Manchester*, 3 E. & B. 336 (E. C. L. R. vol. 77). But the premises, as described, are amongst the "kinds of property" assessable to the poor-rate. [CROMPTON, J.—These words seem introduced with the object of afterwards, in the provisoes, making exemptions and diminutions of the rate at which different kinds of property are assessed. COLERIDGE, J.—There can be no doubt that, if there was a person having beneficial occupation of these buildings, he would be rateable to the relief of the poor. Who is that person here?] It is not necessary, under The Public Health Act, 1848, that the occupier should have a beneficial occupation. The cases on the poor law have *been [*120 much considered lately, and the exemption regretted and much narrowed; *Mayor of Liverpool v. Overseers of West Derby*, 6 E. & B. 704 (E. C. L. R. vol. 88); still it is conclusively settled by authority that such is the construction of the Poor Law Acts. But there is no reason why the exemption should be extended to the district-rates, which are quite as much for the benefit of premises occupied as gaols, court-houses, and for other public purposes, as if otherwise occupied. The word "occupier," when used in other Acts, does not bear the same

restricted meaning as under the poor law: *Regina v. Wilson*, 12 A. & E. 94 (E. C. L. R. vol. 40).

Sir *F. Thesiger*, *contra*, was not called upon to argue.

COLERIDGE, J.—I am of opinion that the rate must be amended. It is agreed in the case that the appellant shall be considered as the person liable to the rate, if any person is liable; but that leaves it incumbent on those who support the rate to show that some one is liable as being occupier. We must therefore inquire what is the nature of the occupation required by The Public Health Act. It is properly admitted that, if this were a poor-rate, there is no sufficient occupation. That could not be disputed after the decisions in *Regina v. The Justices of Worcestershire*, 11 A. & E. 57 (E. C. L. R. vol. 39), *Regina v. Overseers of Manchester*, 3 E. & B. 336 (E. C. L. R. vol. 77), confirmed, as I think they are, by the reasoning contained in the judgment in *Gambier v. Overseers of Lydford*, 3 E. & B. 346 (E. C. L. R. vol. 77). Is then the word "occupier" to be taken in the same sense in this section of *121] The *Public Health Act, 1848, as that which it bears in the Poor Law? Now, looking at the whole section, we find the language similar; and there is a direct reference to the poor-rate to ascertain the value, showing, as I think, that the same kind of occupation is contemplated; for it is assumed that the circumstances are the same. Why should the word occupier be construed differently in this Act from the same word in the poor law? In other Acts the term "occupier" may be used in connection with such circumstances as to show that it must be construed as bearing a different meaning: *Regina v. Wilson*, 12 A. & E. 94 (E. C. L. R. vol. 40), is such a case. It is said, here, that the objects for which the rate is levied are local, and for the benefit of the whole district: I agree that it is so; but so is the poor-rate local for the relief of all the poor of the whole district. It seems to me, therefore, that the word occupier does not bear a different meaning in this Act from that which it bears in the poor law; and, that being so, the distinction is quite well known that, if there be a person having a beneficial occupation, he is rateable; but that there is no such occupation of a gaol, or county court, assize courts or other property occupied exclusively for public purposes.

WIGHTMAN, J.—It is conceded that, if this were a poor-rate, it would be conclusively settled by authority that the rate could not be supported: but a distinction is taken between a district-rate and a poor-rate, which rates are not made under the same Acts. But I think that it was intended, by sect. 88, that the same kind of property, and the same kind *122] of occupation, should make *parties assessable to the district-rate and to the poor-rate. With reference to *Regina v. Wilson*, 12 A. & E. 94 (E. C. L. R. vol. 40), the reason of the decision appears in the course of the argument. The Act substituted a rate for tithes. Patteson, J., asks if it is disputed that the appellant was, before the Act, liable to tithes; and, on its being admitted that he was, Patteson, J., says, "This Act cannot have been meant to exempt those who were liable before." But no distinction of that kind exists here.

CROMPTON, J.—It is conceded that, by the general law as applied to the construction of poor laws, no one is rateable in respect of these premises. Now I see no reason why the same words should have a different sense in this Act. On the contrary, I think sect. 88 is so worded

as to show an intention that the word occupier should bear the same sense. In *Regina v. Wilson*, the Court were satisfied that the Legislature intended to use the word in a different sense. I am so far from being satisfied of that, in the present case, that I am satisfied the intention was the other way.

(No other Judge was present.)

Rate amended.

*IN THE EXCHEQUER CHAMBER. [*123

DAVID ROWBOTHAM *v.* WILLIAM WILSON. *July 1.*

Action by reversioner of land and houses thereon for defendant negligently working mines under the land so as to cause land and houses to subside and be injured.

Defendant had worked the mines carefully, according to the custom of the country; but the subsidence had nevertheless occurred; and no natural or artificial pillars could have prevented this.

Plaintiff was owner of the surface by conveyances from P.; defendant was owner of the mines by conveyances from H.

An Act appointed Commissioners "for dividing, allotting, and enclosing" certain "common fields, common ground, and other the commonable lands, &c.," not expressly mentioning mines. It was enacted that they should "divide, ascertain, and allot the said common fields, common grounds, commonable lands and premises, hereby intended to be enclosed, unto and amongst the several persons" "entitled to or interested therein, either in right of soil or of any other right or interest whatsoever, in a due and fair proportion, as near as may be, according to the value of the shares and interests, rights of common, and other properties, of each of the said parties respectively in and over the said premises so to be divided and enclosed, without giving any undue preference to any of them, and with a just regard to the quality, convenience, and contiguity of situation, as well as to the quantity of the lands to be assigned to each proprietor, and with a just regard to any mines or delphs of coal, lime, or stone supposed to lie under the same, but subject, nevertheless, to the rules, orders, and directions by this Act prescribed." It was recited that there were lands supposed to have mines under them, and the proprietors might be desirous of retaining their property therein; and it was enacted that such of the lands of the proprietors as the Commissioners should adjudge to have any mines of coal, &c., should be "allotted and set out together, by metes and bounds, in distinct lots," for such of the proprietors as should desire and as should give certain notice thereof; or otherwise there should be set out for them "other lands under which there shall be supposed to lie mines of equal value to those which they were respectively possessed of before the passing of this Act." The Commissioners were directed to draw up an award, which should express the quantity "contained in the said common fields, common grounds, commonable lands and premises, so intended to be enclosed as aforesaid, and the quantity of each and every part and parcel thereof which shall be assigned and allotted to the several parties entitled to and interested in the same; and a description of the situation, abutments, and boundaries of such parcels and allotments respectively;" and directions for fencing, making roads, &c.; and which should "likewise specify, express, and contain such other orders, regulations, and determinations as shall be proper and necessary to be inserted therein, conformable to the tenor and purport of this Act."

P. and H. were both interested in the common lands, and in mines lying thereunder. An award was made, purporting to be under the hands and seals of the Commissioners and of other proprietors, and executed in fact by P., but not by H., allotting certain lands to P. and H., and reciting that the mines on the estates of P. and H., previously to the enclosure, had not "been requested to be set out by metes and bounds;" and assigning to each, in lieu of the mines previously on his estate, certain mines, namely, to H. the mines lying under the allotment of P.; and to P. mines not under his own allotment. The Commissioners adjudged the mines so allotted to be equal in value to the mines previously possessed by P. and H. respectively. The award contained a clause, reciting that, to preserve the convenience and situation of the allotments, it had been found necessary in some cases to assign, wholly or partially, the mines under particular allotments to persons other than those to whom the surface was awarded: and the proprietors, parties to the award, were the only persons interested in the disposal of land and mines under such circumstances, and did, by executing it, testify their

acceptance of the allotments, and did, for themselves their heirs, executors, administrators, successors, and assigns, release all interest in any of the mines except such as were allotted to them: and they did thereby, for themselves and their heirs, executors, administrators, successors, and assigns, covenant with such other, and the heirs, administrators, successors, and assigns of each other, that the mines allotted should be held by the allottees according to the intent of the award, and by them worked "without any molestation, denial, or interruption" of any parties to the presents and those claiming under them, being owners of the surface, without being subject or liable to any action or actions for damage on account of working and getting the said mines for or by reason that the surface of the lands aforesaid may be rendered uneven and less commodious to the occupiers thereof by sinking in hollows, or being otherwise defaced and injured, where such mines shall be worked, the said several proprietors, parties to these presents, and interested in the disposal of lands and mines, under the circumstances aforesaid, having agreed with each other, and being willing and desirous to accept their respective allotments in their several situations hereinbefore declared, subject to any inconvenience or encumbrance which may arise from the cause aforesaid;" provided that there should be no power to sink shafts without the consent of the owners of the surface.

H. and P. took possession of their allotments, including the mines allotted: and they, and those claiming under them, held for more than eighty years before the act complained of. After such taking of possession, but more than twenty years before the act complained of, the houses mentioned in the declaration were built.

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the defendant was not liable to an action. Per Williams, J., Martin, B., Crowder, J., and Bramwell, B.; dissentientibus Cresswell, J., and Watson, B.

Per Cresswell, J., Williams, J., Martin, B., and Watson, B., and *semble* per Bramwell, B., the right of support is not an easement, but one of the ordinary rights of property.

Per Williams, J., Martin, B., Crowder, J., and Bramwell, B., a right to work mines so as to let down the surface, may be granted by the owner of the surface so as to bind assignees of the surface; and in this case was so granted.

Per Cresswell, J., and Watson, B., such a right cannot be created so as to bind the assignees; and the legal effect of what took place in the present case was a covenant binding P. and his representatives, but not assignees of the land.

THE plaintiff declared in the Court of Queen's Bench against the defendant.

*124] *Count 1. For that, whereas, before and at the time of the committing the grievances after next mentioned, certain houses were in the possession of divers persons as tenants thereof to plaintiff, the reversion therein respectively then and still belonging to plaintiff, which houses had been erected and standing for more than twenty years before the time of the committing the said grievances; and plaintiff, before and at the time of the committing the grievances hereinafter

*125] next mentioned, *was rightfully entitled to have the said houses, in which he was so interested as aforesaid, and the foundations thereof, supported by the soil and land contiguous and near to the same, and also to have the foundations of the said houses, and the land whereupon the same were erected and standing, sufficiently supported by the minerals lying under the said last-mentioned land: yet defendant wrongfully and negligently worked certain mines under the land on which the said houses were erected, and under the land contiguous and near thereto, and removed the coals and minerals from the said several mines without leaving any sufficient support to the said houses, so that, by reason thereof, the foundation of the said houses, in which the plaintiff was so interested as aforesaid, became and were weakened, damaged, and undermined, and became incapable of supporting the said houses; and the said houses cracked, sank in, and became and were dilapidated and unsafe: and, by means of the premises, divers of the said houses became and were unfit for habitation for considerable periods of time,

and became and were of much less value to the plaintiff than they otherwise would have been. And plaintiff has been injured and prejudiced in his reversionary estate and interest.

Count 2. And whereas, before and at the time of defendant committing the grievances hereinafter mentioned, certain land was in the possession of certain persons as tenants thereof to plaintiff, the reversion therein then and still belonging to plaintiff: yet defendant wrongfully and negligently, and without leaving any proper and sufficient support in that behalf, worked certain coal mines under and contiguous to the said land *in which plaintiff was so interested as aforesaid, and got and removed the coals and minerals and earth of and in the [*126 said last-mentioned mines; and, by reason thereof, the soil and surface of the said land, in which plaintiff was so interested as aforesaid, gave way, and sank in, and became low, hollow, and uneven, and liable to be covered with water; and thereby the said land became unfit for cultivation as garden ground (for which purpose it had previously been cultivated), and became and was of much less value than the same had theretofore been: and plaintiff became and was greatly injured and prejudiced in his reversionary estate therein.

The defendant having appeared, the following case was stated, by consent of the parties, for the opinion of the Court of Queen's Bench.

The plaintiff, before and at the time of the committing of the grievances mentioned in the declaration, was the reversioner in fee of the surface lands and of the buildings mentioned in the first count of the declaration, and of the surface land mentioned in the second count, having become seised of the same premises by virtue of divers meane conveyances from one Samuel Pears, to whom the said surface land was allotted by the award hereinafter mentioned. The buildings upon the land in the first count mentioned, which was derived from the said S. Pears, had been erected more than twenty years before the accruing of the causes of action in that count mentioned: and the said houses were not upon the land at the time of the execution of the award hereinafter mentioned, nor until long afterwards. The defendant, before and at the time of the committing of the same grievances, was entitled to, and worked, the mines of *coal, being the same mines as those allotted [*127 to Henry Howlette by the award hereinafter mentioned, under the said premises. And the damage to the plaintiff's reversion, mentioned in the said first and second counts, was caused by the subsequent sinking of the soil. The course and practice of mining, before and at the time of the Act and award hereinafter mentioned, and since, in such cases used and approved of in the county and neighbourhood in which the said mines were situate, was, for the owner of the mine to get the whole of the underlying mine without leaving any pillars of the same coal by way of support, the coal there worked being of so soft and perishable a nature as that any coal left by way of support would in a short space of time fall away and decay: but, instead of leaving pillars of the same coal, the course and practice of mining, during the period aforesaid, used and approved of in the county and neighbourhood aforesaid, has been, and is, to erect and leave pillars of the refuse coal, called lamb and slack, which form a much more durable support than pillars of the same coal would, if left. The defendant's mines have always been worked without any negligence on his part, and according to the said

course and practice of mining: and he left, as is usual, pillars of lamb and slack, according to such course and practice. No natural or artificial pillars would prevent the accrual of the injuries now complained of, which have arisen from the natural subsidence of the surface soil, on getting the mine according to the use and practice of the county and neighbourhood as aforesaid.

*128] By an Act of Parliament made, &c., in 9 G. 3, (a) *intituled, "An Act for dividing and enclosing the common fields, common grounds, and commonable lands, in the parish and township of Bedworth, in the county of Warwick; and for regulating certain charity estates within the said parish," certain Commissioners were appointed for the purposes, and with the duties, powers, and authorities, in the said Act more particularly mentioned. Such Commissioners, on the 21st of June, 1770, made and published an award or instrument in writing, purporting to be made by virtue and in pursuance of, and in conformity with, the said Act, and in exercise of the powers thereby conferred on them. The said instrument or award was made between and under the hands and seals of the Commissioners under the said enclosure Act, and of nine persons, mentioned in the case, including Samuel Pears, but not Henry Howlette. And the said Commissioners did thereby award and allot (amongst other things) certain lands to Henry Howlette: "And, as to the mines on the said estate of the said Henry Howlette, previous to the enclosure thereof, the same not having been requested to be set out by metes and bounds, we do assign, allot, and appoint unto the said Henry Howlette, in lieu thereof, all the mines of coal and limestone under the several allotments of land before made to him, and also all the mines of coal under the allotments to Samuel Pears, and also all the mines," &c., (describing other parcels). The said Commissioners did also award and allot to the said Samuel Pears "all that lot or parcel of land lying" (describing the parcel). And, as to the mines on the estate of the said Samuel Pears, the Commissioners did assign and allot to the said Samuel Pears "all the mines of coal under that part of the turnpike *129] *road contained between," &c. (describing the situation); which the said Commissioners adjudged to be equal in value to the mines he was previously possessed of, without being entitled to any part of the mines under his own allotment of land; which last-mentioned mines were thereby before awarded to the said Henry Howlette. The said award also contains the following clause and covenant, namely: "And, whereas, in order to preserve the convenience of situation of the allotments to the several proprietors interested in the said enclosure and division, it hath been found necessary, in some cases, to assign the mines under the whole of some particular allotments, and in other cases part of such mines, to different persons than those to whom the allotments of the surface land are awarded; and the several proprietors, parties to this our award, are the only persons interested in the disposal of land and mines under such circumstances, which said proprietors, parties hereto, do, by their sealing and executing these presents, testify their acceptance of their respective allotments in manner as the same are allotted to them as aforesaid, and do for themselves, severally and respectively, and for their several and respective heirs, executors,

administrators, successors, and assigns, utterly disclaim, release, and disavow all right, title, interest, claim, and demand of, in, or to any of the mines under their several allotments except such or such part thereof only as are hereinbefore particularly mentioned and described to be allotted to each of them: and the same proprietors do hereby for themselves, severally and respectively, and for their several and respective heirs, executors, administrators, successors, and assigns, covenant, promise, and agree to and with *each other, and the heirs, executors, administrators, successors, and assigns of each other, [*130 that the said mines so allotted under the circumstances aforesaid shall or lawfully may for ever after be held and enjoyed by the respective persons to whom the same are assigned, according to the true intent and meaning of this award, and by them and every of them be worked and gotten accordingly, without any molestation, denial, or interruption of any other person or persons parties to these presents, and those claiming under them respectively, who, for the time being, are or may be owner or owners of the surface of the lands under which such mines are situate, and without being subject or liable to any action or actions for damage on account of working and getting the said mines, for or by reason that the surface of the lands aforesaid may be rendered uneven and less commodious to the occupiers thereof by sinking in hollows, or being otherwise defaced and injured, where such mines shall be worked; the said several proprietors, parties to these presents, and interested in the disposal of lands and mines, under the circumstances aforesaid, having agreed with each other, and being willing and desirous, to accept their respective allotments in their several situations hereinbefore declared, subject to any inconvenience or encumbrance which may arise from the cause aforesaid: so nevertheless, as that nothing herein contained shall extend, or be construed to extend, to authorize or enable any of the parties, for the time being entitled to the said mines, to sink pits in the allotments under which the same are situate, for the purpose of working the said mines, without the consent of the then owners of the surface of the same allotments previously *obtained, or in any [*131 manner to dig or break the said surface without the like consent."

If the Court shall be of opinion that the defendant is liable for the injury done to the plaintiff's land and buildings in the first count mentioned, or his land in the second count mentioned, the verdict is to be entered for the plaintiff for 800*l.* upon one or both counts accordingly, subject to a reference to, &c., as to the amount of damages eventually sustained by the plaintiff. Should the opinion of the Court be adverse to the plaintiff on both or either of the above points, as to both counts or either of them, the verdict is to be entered for the defendant upon one or both counts accordingly.

The Act of Parliament, the award, and a plan of the locus in quo, were made part of the case.

The clauses of the Act material to the argument, in addition to the above statement of the case, were as follows.

It recited that there were, within the township and parish of Bedworth, "certain common fields, common grounds, and commonable lands." The recital did not mention mines expressly.

The Commissioners were "appointed Commissioners for dividing,

allotting, and enclosing the said common fields, common grounds, and other the commonable lands within the township and parish of Bedworth aforesaid, and for putting this Act into execution, according to the rules, orders, provisions, and directions hereby established, appointed, and prescribed."

*132] "It was enacted that a survey should be made of "the said open and common fields, common grounds, and commonable lands, and all other the premises hereby intended to be enclosed as aforesaid."

"And be it further enacted, that the said Commissioners, or the major part of them, shall, and they are hereby authorized and required, as soon as conveniently may be after the said survey and admeasurement shall be laid before them, to divide, ascertain, and allot the said common fields, common grounds, commonable lands and premises, hereby intended to be enclosed, unto and amongst the several persons who, at the time of executing the award or instrument hereinafter directed to be made, shall be entitled to or interested therein, either in right of soil or of any other right or interest whatsoever, in a due and fair proportion, as near as may be, according to the value of the shares and interests, rights of common, and other properties, of each of the said parties respectively in and over the said premises so to be divided and enclosed, without giving any undue preference to any of them, and with a just regard to the quality, convenience, and contiguity of situation, as well as to the quantity of the lands to be assigned to each proprietor, and with a just regard to any mines or delphs of coal, lime, or stone supposed to lie under the same, but subject, nevertheless, to the rules, orders, and directions by this Act prescribed, ordained, established, and appointed."

"And, whereas there are lands in the said parish supposed to have mines under them, and on that account the said proprietors may be desirous of retaining their property therein: Be it therefore enacted, *133] that such of the lands of the said proprietors as the said Commissioners, or the major part of them, shall adjudge to have any valuable mines of coal, ironstone, or limestone under them, shall be by the said Commissioners, or the major part of them, allotted and set out together, by metes and bounds, in distinct lots, unto or for such of the said proprietors, respectively, as shall desire the same: provided such desire shall be signified by writing under their hands to the said Commissioners within twenty-one days next after their first meeting to put this Act into execution; or otherwise that there shall be set out, for such proprietors, other lands under which there shall be supposed to lie mines of equal value to those which they were respectively possessed of before the passing of this Act. And the said Commissioners, in allotting the said mine lands, shall make just allowances between such of them the delphs whereof remain entire and unbroken, and such of them which have heretofore been opened and in part worked. And it is hereby further enacted, that it shall and may be lawful to and for the said last-mentioned proprietors, or any of them, their heirs, assigns, agents, servants, and workmen, from time to time and at all times hereafter, at their free wills and pleasure, to go down and convey themselves into any coalpit or coalpits which now are, or shall hereafter be, made or sunk in the said fields hereby intended to be enclosed, and by

latching, and other proper experiments, to search and examine whether the owner or owners, proprietor or proprietors, of such coalpit or coalpits are at work upon or getting any other coal or coals than what there belongs to, and is the property of, such owner or owners, proprietor or proprietors."

"And, for preventing all differences and disputes relating to the said enclosure and division: It is hereby *enacted that, as soon as [*134 conveniently may be after the said Commissioners shall have completed and finished the partitions and allotments of the said open and common fields, common grounds, commonable lands and premises, according to the tenor, true intent, and meaning of this Act, they or their successors, or the major part of them, shall form and draw up, or cause to be formed and drawn up, an award or instrument in writing, which shall express the quantity in statute measure of acres, roods, and perches, contained in the said common fields, common grounds, commonable lands and premises, so intended to be enclosed as aforesaid, and the quantity of each and every part and parcel thereof which shall be assigned and allotted to the several parties entitled to and interested in the same; and a description of the situation, abutments, and boundaries of such parcels and allotments respectively; and proper orders and directions for the fencing and surrounding thereof and for keeping the said mounds and fences in repair, and also for making and laying out proper roads, ways, and passages in and through the same premises, and shall likewise specify, express, and contain such other orders, regulations, and determinations as shall be proper and necessary to be inserted therein, conformable to the tenor and purport of this Act."

The award of mines to Samuel Pears was as follows.

"And, as to the mines on the estate of the said Samuel Pears, previous to the enclosure thereof, the same not having been requested to be set out by metes and bounds, we do assign and allot to the said Samuel Pears, in lieu thereof, all the mines of coal under that part of the turnpike road contained between a line," &c. *(describing the [*135 position); "which we do adjudge to be equal in value to the mines which the said Samuel Pears was possessed of in the said open fields before the enclosure thereof, without being entitled to any part of the mines under his own allotment of land laid out for him as aforesaid; which last-mentioned mines are hereby before awarded to the said Henry Howlette, in part of his compensation for mines in the said fields."

And, by the description and plan, it appeared that mines were allotted to Pears lying under land the surface of which was allotted to other persons.

On this case, judgment was given in the Court of Queen's Bench, for the defendant, in Trinity term, 1856.(a)

On this judgment the plaintiff alleged error in the Exchequer Chamber; and the defendant denied the allegation.

The case was argued in last Hilary vacation.(b)

Hayes, Serjt., for the appellant (plaintiff below).—Under the Act, the Commissioners had no power to allot any portion of the surface to one person, and the mines under the surface to another. Nor, therefore, had they power to lay down any stipulations as to the terms on which

(a) *Rowbotham v. Wilson*, 6 E. & B. 593 (E. C. L. R. vol. 88).

(b) February 2, 1857.

the two, when in different hands, were to be enjoyed: and the award, so far as it does this, is altogether collateral to the Act, and can operate only as a conveyance, or contract, between the parties who, as stated in the award, have executed the instrument. The effect is at most a covenant not to sue, or an estoppel. The language of the instrument *136] shows that it was intended *that all parties should come in. Now, independently of special contract, the plaintiff, being owner of the surface, is, of common right, entitled to the support of the soil below: *Humphries v. Brogden*, 12 Q. B. 739 (E. C. L. R. vol. 64); *Smart v. Morton*, 5 E. & B. 30 (E. C. L. R. vol. 85); *Harris v. Ryding*, 5 M. & W. 60;† *Roberts v. Haines*, 6 E. & B. 643 (E. C. L. R. vol. 88). Of these authorities, *Humphries v. Brogden* may be considered as the leading case: it was decided upon the consideration of the analogy of the right, in English law, to support from ground laterally adjoining, and to the Civil, Scotch, and French law. When it is said that the owner of the surface is of common right entitled to the support, the meaning is that he has the title without proof or presumption of grant. The parties may, of course, vary their rights by express stipulation: but, in the absence of this, the presumption is that neither party is to injure the other: and indeed the relation between the owner of the surface and the owner of the mine does not require liberty to undermine: the miner may always do so, if he leave pillars of coal or other material sufficient for the support. It is just like the case of the grant of the lowest floor of a house by the owner of the upper part. Now, as to the Act, it is to be observed that its object is, not to enclose the common, but to separate the lands. It appears also that the mines were to be set out by bounds for the present proprietors, should they desire it. Then, as to the award, it appears that mines are allotted which are supposed to be equal in value to the mines before owned by the allottee, not that an alteration in the quantity of the mine is compensated by an alteration in the quantity of the surface, which is assumed in the judgment below; *137] though, if this were otherwise, it would *not be of any importance in the argument. The title of the parties to the mines is, of course, now safe; not from the award of the Commissioners, but from a possession of a hundred years. But such possession will not destroy the common law right of the owner of the surface. The covenant of the parties will not run with the land: indeed this is not supposed in the judgment below. A covenant burthening the land runs with the land only in the case of lessor and lessee. A particular legal quality cannot be imprinted on the land itself by any act of the parties. Thus a covenant not to use the land for building a mill would bind none but the parties. The only mode of subjecting land to a permanent liability is by conveying it to trustees and enforcing the trusts in equity. This principle does not appear to be disputed in the judgment below: and it is fully explained in the note on *Spencer's Case*, 5 Rep. 16 a, in *Smith's Leading Cases*, 1 Lea. Ca. 61 (4th ed.), and in *Keppell v. Bailey*, 2 Mil. & K. 517, there cited. It is said in the judgment of the Court below that Pears had only a qualified easement. It is not easy to understand what such a right would be. [BRAMWELL, B.—Do you say that the parties could not, in any way, create an unlimited right in the miner to destroy the support by his mining?] *Hilton v. Earl Granville*, 5 Q. B. 701 (E. C. L. R. vol. 48), does go as far as that: but it is true that the

authority of that case is questionable; and it is not necessary to go so far. The right to the support is not properly an easement: it is a general right annexed to all land. The question as to the houses, as distinct from the general question as to the land, is a minor point: but it may be observed that, if the judgment of the Court below be correct as to this, *no right to support houses could be gained by any lapse of time. [WILLIAMS, J., referred to *The Caledonian Rail. way Company v. Sprot*, 2 Macq. Reports of Scotch, &c., Cases, in the House of Lords, 449.] [*138]

Montague Smith, contrâ.—The plaintiff had not the easement claimed: it never existed at all. [CRESSWELL, J.—My brother *Hayes* does not claim on the ground of easement.] There can be no other foundation for the claim. No trespass is committed: the only question is whether the defendant's mine is servient to the plaintiff's land. The words "common right" do, indeed, occur in the marginal note to *Humphries v. Brogden*, 12 Q. B. 739 (E. C. L. R. vol. 64): but they are not to be found in the judgment. All that the decision shows is that, where the severance of the surface and the mine takes place without anything being said to the contrary, an easement will be presumed. The whole right is there explained and defended as an easement. Here there is, at the time of severance, an express renunciation. It is precisely the case anticipated in the judgment in *Humphries v. Brogden*. In *Smith v. Kenrick*, 7 Com. B. 515, 564 (E. C. L. R. vol. 62), which was a question between owners of adjacent mines, the Court say: "Treating the question as a new one, not governed by the authority of any decided case,—for, all those referred to are distinguishable,—it would seem to be the natural right of each of the owners of two adjoining coal mines,—neither being subject to any servitude to the other,—to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be, that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or *malicious conduct of the party." The easement might be abandoned without deed; in fact, any evidence of intention would be enough. [CRESSWELL, J.—The right is not that of an enjoyment on the land of another. If the owner of land adjoining to yours puts up a wall or other work to prevent the subsidence of your land, he may dig in his own as much as he pleases. *Hayes*, Serjt.—In *Gale On the Law of Easements*, p. 216, it is pointed out that the right to support exists "rather as a right of property than as an easement, as being necessarily and naturally attached to the soil."] It is not necessary to inquire whether the Commissioners had the power to put an end to the presumption of easement: the parties themselves have agreed to the severance on those terms. But why should the Commissioners not separate by a horizontal demarcation, as well as by a vertical one? The suggestion of the Court below, as to compensating an inequality in the allotment of the surface by an inequality in the allotment of the mine, was merely made for the purpose of showing in what way a consideration for the abandonment of the easement might have been given. The doctrine laid down in *Hilton v. Earl Granville*, 5 Q. B. 701 (E. C. L. R. vol. 48), and which was essential to the decision of that case, that a grant giving in express terms the right to undermine could not be supported, is now universally acknowledged to be bad law. That there

might be such a good grant even in the case of upper and lower rooms is clear from the judgment in *Humphries v. Brogden*, 12 Q. B. 739 (E. C. L. R. vol. 64): and the case of mines is much stronger, because the power to work is essential to the enjoyment of a mine; but it is not *140] easy to conceive a case where the power to *destroy the support given to an upper room by a lower one is essential to the enjoyment of the lower one. [BRAMWELL, B.—Cannot an owner of land who grants a mine give a power to sink a shaft from the surface?] Such a power is the constant subject of grant, although it actually, pro tanto, destroys the surface. There is nothing absurd in the notion of a qualified easement: the owner of the surface might have a right, in the nature of an easement, to insist that the mines should be carefully worked, though this was qualified by the power of the mine-owner, if he worked carefully, to diminish the support.

Hayes, Serjt., in reply.—If there is not a full right to support, there is no easement at all. Taken as a grant by the owner of the land, the instrument could bind the person only, and not the land. [BRAMWELL, B.—Can I not grant to my neighbour the right to build a house so near my land that I cannot dig my land without injuring it? And will not that bind every owner of the land?] That would operate only as a covenant not to sue. [BRAMWELL, B.—But, after a house has stood in such a position twenty years, it acquires a right to support from the adjoining land.] That is an incident which the law then annexes: it is sometimes said to be founded on a presumed grant; but that, after all, is a mere fiction. [CRESSWELL, J.—I always thought that would turn out to be a matter of positive law, like the right acquired by constructing a window.] That seems so: who would think of granting a window? The object of the Prescription Act, 2 & 3 W. 4, c. 71, was to get rid of such fictions. *Cur. adv. vult.*

*141] *The learned Judges, not agreeing in opinion, now delivered their several judgments seriatim.

WATSON, B.—This was an action on the case. The first count of the declaration was for an injury to land: the second count for an injury to plaintiff's house by defendant working mines underneath.(a) The defendant pleaded a special plea, setting up a right to do so under an award and a covenant by the former owner of the land; and the facts were stated in a special case, upon which judgment was given by the Court of Queen's Bench for the defendant. The plaintiff appealed against that judgment.

The plaintiff was owner of the house and land; the defendant was owner of the coal mines underneath. The defendant, by the working thereof, had caused a subsidence and consequent injury to the plaintiff's house and land. The mines had been worked properly, and in compliance with the usage of the country.

The question turned on the effect of an award made under "An Act for dividing and enclosing the common fields, common grounds, and commonable lands, in the parish and township of Bedworth, in the county of Warwick; and for regulating certain charity estates within the said parish," and the execution under seal of the same, in compli-

(a) According to the record, the first count was in respect of the injury to houses, the second in respect of the injury to land.

ance with the direction in the award, by the then owner of the plaintiff's land. The plaintiff's lands were allotted to Samuel Pears, by the award; upon which the plaintiff had built, more than twenty years ago, the houses alleged to be injured. The defendant's mines were by the award allotted to Henry Howlette.

*I am of opinion that the judgment of the Court of Queen's Bench should be reversed. The award was, as regards the [*142 mines, not in compliance with the provisions of the Act of Parliament, and a void execution of the powers contained in the Act; and in my opinion no estate vested either as to the land or the mines by force of the award. The whole question turns on the effect of the covenant of Pears, entered into by him by the execution of the award. It was contended, for the plaintiff, that this covenant was a mere covenant not to sue, which would not run with the land; and that it would not operate as a grant. I think that is so. It is established by authorities, *Wilkinson v. Proud*, 11 M. & W. 33,† that the coal mines, when conveyed, become a separate tenement. The land above and the coal beneath become separate tenements, with all the incidents of separate ownership. The same rules of law apply in such case as to the right of lateral support of adjoining lands, which is not an easement. If, by digging, the adjoining land is let down, the right to compensation is on the ground that the adjoining owner could not use his own land to the prejudice of his neighbour, not on the ground of the disturbance of an easement; 2 Rol. Abr. 564, *Trespass* (I), pl. 1. The course of precedents shows this: for it is not necessary to allege, in such case, that the plaintiff had the right to support (*Earl of Lonsdale v. Littledale*, 2 H. Bl. 267, and the declaration and judgment in *Humphries v. Brogden*, 12 Q. B. 789 (E. C. L. R. vol. 64)); with this distinction, that the right to support to a building upon the land is acquired by twenty years' existence, whereas the land is entitled to support in its original state. The terms used in the award are in the form of *a covenant not to sue for [*143 any surface damage. No doubt these words might operate as a grant, if the subject-matter was capable of a grant. But I am of opinion it could not be the subject-matter of a grant. The real question is, whether this exemption from liability for damage caused by the owner of land or coal digging his own land or coal, either laterally or vertically, is capable of being the subject-matter of a grant. To be the subject-matter of a grant, it must be an easement to be imposed on the corporeal property of the grantor. Easements are defined by Mr. Gale as positive and negative. Rights of way, rights to water, right to pollute water, and rights of common, are well defined as easements to be exercised by one person over the land of another. The right acquired by time to send noxious vapours over another's land is another instance. It was argued that the right to lights, viz., to do something by a person on his own land not to be interfered with by his neighbours, was similar to the present case. It is clear that the right to light and air was obtained by user for twenty years before the Prescription Act; *Flight v. Thomas*, 8 Cl. & Fin. 231: and now, by the third section of the Prescription Act, twenty years' user without interruption, acquiesced in for one year, establishes the right absolute and indefeasible. Whatever expressions are used in some cases referring to grants of light and air, it is laid down that such a grant is only a covenant not to build on the

adjoining land (per Parke, B., *Harbidge v. Warwick*, 3 Exch. 552, 556†). It is difficult to see how such a covenant would bind the land of the covenantor in the hands of a purchaser. The covenant not to *144] build, if operating to *bind the land, still is to allow the light and air to pass over the covenantor's land to the newly built house. The present claim is not analogous to that of lights; for this, as nothing is to be done on or over plaintiff's land, but only in the event of surface injury from works, is a covenant not to sue. It is most important that such burdens should not be annexed to estates: no case will be found to this effect, to say that Pears and those claiming under him took subject to it: they were alone bound by the covenants running with the land. For these reasons, I think the plaintiff is entitled to recover.

But there is another ground on which it is difficult to see how this could operate as a grant; for, if the award be void at the time of the execution of the award by Pears, the supposed grantor had no estate out of which he could grant this right, and the supposed grantee had no estate to which such a right could be annexed. To constitute a valid grant, the grantor must have an interest in himself to grant (per Holt, C. J., *Saunders v. Owen*, 12 Mod. 199). In this view, it is important to consider the title derived under the award, and the effect of the execution of the award, and the legal principles that govern them. The award was to divide and allot lands and mines according to the Act of Parliament; the title to the lands, therefore, was to be under the award. The award, not being in accordance with the provisions of the Act of Parliament, conferred no title. Neither the landowner nor the mine-owners took any estate by force of the award. It was an invalid, not a defeasible, title. Pears had no valid title to the land; Howlette had *145] no title to the *mines. By twenty years' possession they acquired titles. See stat. 3 & 4 W. 4, c. 27, s. 34. Under this Act, the right or title is barred at the determination of the twenty years. That title was derived from the twenty years' possession, and not from the award. When did the supposed grant take effect? Not at the time of the execution of the award. The estate depends on a title acquired by possession at the end of the twenty years. Did the grant then attach? I think not. It is true, where a person without title professes to convey an estate or grant an easement, his conveyance operates by way of estoppel, if, at a subsequent period, he acquires the fee: and the subsequently acquired estate is bound thereby; or, as it is termed, the newly acquired estate feeds the estoppel (*Weale v. Lower*, Pollexfen 54, 68; *Rawlins's Case*, 4 Rep. 52 a; *Sturgeon v. Wingfield*, 15 M. & W. 224.†) But here there can be no estoppel, inasmuch as the whole matter is disclosed by the award as executed by Pears, under whom the plaintiff claims. If so, there is no estate bound by this grant: *Pargeter v. Harris*, 7 Q. B. 708 (E. C. L. R. vol. 53). If this does not operate as a grant, it cannot operate as a covenant running with the land: 1st. There is no privity of estate between the original covenantor and covenantee; 2d. The covenant not to sue is not inherent in the land; it does not affect the land itself, but is merely personal, and exempts the owner from damages occasioned by getting the coal. See *Keppell v. Bailey*, 2 Myl. & K. 517.

For these reasons I think the judgment of the Court of Queen's Bench

erroneous, and that it ought to be *reversed. An argument has been suggested that, by accepting this allotment, Pears took the land, and his successors hold the land, subject to this exemption from damages from injury. This can only be upon legal principles, viz. that the land is bound by a grant or by a covenant real; neither of which exists. [*146]

Therefore I think the judgment should be reversed.

BRAMWELL, B.—The plaintiff complains that the defendant, in working certain mines under and near the plaintiff's land (and which mines belonged to the defendant, or which he had a right to work), not carelessly or wrongfully (except in regard to the particular result of damage to the plaintiff's land), caused a subsidence of that land. The defendant, admitting the facts, asserts a right on his part to do what he has done, and that the plaintiff has no cause of action against him in respect thereof.

Now I think it inaccurate to say that the plaintiff is claiming any kind of easement, qualified or otherwise; an easement seeming to me to be something additional to the ordinary rights of property. I think the plaintiff is merely claiming the common right not to be injured in his property by the way in which another uses his. But I do not think it necessary to determine this; for I think that, whether the defendant is entitled to the mines as a separate tenement, whether the space they occupied belonged to him, or whether he has a grant of the minerals and a license to take them, or whether the right of the surface or general owner to support from the mines below is a natural territorial right or an easement absolute or qualified, or whether the right to sink *pits and to cause subsidence is a natural incident of a grant of the mines or license to take them, the defendant is entitled to [*147] judgment.

The first question is, Can there be a right to take the mines and remove all support from the surface? The plaintiff says that it is a right which cannot exist as binding the estate, but only to the extent of personally binding its grantor; in other words, that the obligation cannot run with the land; and he cites cases to show that the power of the owner of the land to annex incidents to it is limited. But, as far as this objection goes, I am of opinion that it is competent to the owner of land, on or after the severance of the mines, to grant to the grantee of the mines the right to damage the surface. I cannot see how, if there may be a grant of mines, and of the right to enter, sink shafts, and work, there may not be such a grant as that contended for here. Nor can I see how, if a grant of the right of unobstructed light and air, or of support of the soil, to an adjoining owner, would be good, a grant of such a right as claimed here would not be. My brother *Hayes* said, presumed grants of windows and of support were idle fictions, which ought never to have been invented: perhaps so; but the fact that they were shows that the inventors and everybody else supposed that real grants of such a nature would be good. But another objection is taken. It is said that all easements suppose a right exercised over the servient tenement: even in the case of lights it is the passage of the rays of light and of air; and in the support of the neighbouring soil it is its continuance in its place; and that the claim of the defendant here is not to do something on the plaintiff's land, but merely not to be sued for

*148] what he does on his own. It is no answer to this objection to say that it is exceedingly subtle. It certainly would be strange if such a right could not be given with a grant of an estate in the mines, but could to a licensee; and yet to the latter the objection would not apply. And I think the true answer to it (assuming the defendant claims an easement) is, that the rules which are applicable to owners adjoining vertically, which is the natural order, are not applicable where there is an unusual order of things, viz. a division of horizontal ownership. I think, therefore, such a right may exist, but it remains for the defendant to show he possesses it; and I agree that the award could not give it, as there was no jurisdiction or power in the Commissioners to give it. But I think that the acceptance by Pears of his estate in the soil, on the condition that the mines thereunder, with a right of working the same, though to the damage of the surface, should belong to another, is sufficient to give that right to that other, at all events coupled with the covenant of Pears, which may well operate as a grant. It may be that the award was altogether void, and that the allottees have no title except from lapse of time, because the award as to the right to work mines to the damage of the surface is not a mere excess that can be rejected, but is a detriment to the surface that must have been otherwise compensated for; so that, if the plaintiff here is right, his allotment would be had without that loss which it was to compensate. If so, the matters are so mixed up as to make the award void: *Sercombe v. Babb*, 8 M. & W. 332.† But it seems to me that, whether Pears's estate was rightfully or wrongfully created, if he takes it he takes it on the *terms of its creation; especially bearing in mind his execution

*149] of the award. A similar argument would show that the defendant was not entitled to the mine unless by lapse of time. It is not material; but I may observe that Howlette's non-execution of the award is unimportant, as he is to own all the mines under his own land. On this ground, I think the defendant entitled to judgment. *Humphries v. Brogden*, 12 Q. B. 739 (E. C. L. R. vol. 64), was referred to by both sides: but that case merely decided that, at common right, the owner of the surface is entitled to support from the subjacent strata where differently owned. This had been assumed before, in *Harris v. Ryding*, 5 M. & W. 60,† and indeed is almost a truism when put thus, that there is no presumption, in such case, that either owner has a right to damage the other.

MARTIN, B.(a)—The Court of Queen's Bench were of opinion that the defendant was not responsible, and gave judgment accordingly: and in my opinion the judgment was right, and ought to be affirmed.

It is quite clear that a man may grant the mines under his land; and, according to Sheppard's Touchstone, ch. 5, p. 89, therewith is granted a power to dig them; and with such a grant there shall pass inclusive, together with the thing, without the words "*cum pertinenciis*" or such like, all the means to attain the minerals, and all the fruits and effects of the grant. And the maxim is cited, "*Cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit.*" It

*150] seems to me, therefore, that, if a man grant the mines under his land, and if, as is stated in the present case, a subsidence of the

(a) This judgment was read by Bramwell, B.

surface take place notwithstanding the utmost skill is exercised in the working of the mines, the grantor must submit to the inconvenience and loss consequent upon the subsidence, and has not a right of action against the grantee. The grantor cannot derogate from his own grant.

Upon the same principle, I think the owner of land may grant the surface subject to the quality or incident that he shall be at liberty to work the mines underneath, and not be responsible for any subsidence of the surface. If the law of itself, under certain circumstances, protects from the consequences of an act, I think a man may contract for such protection in a case where the law of itself would not apply. "*Modus et conventio vincunt legem.*" I am aware that in *Hilton v. Lord Granville*, 5 Q. B. 701 (E. C. L. R. vol. 48), there is a passage in the judgment of the Court adverse to this: but, in my opinion, the view taken by the Court of Queen's Bench, as expressed by Lord Campbell in the judgment in the present case, is the more correct. A man may grant the right to dig turf in his land, or to take clay from his land, or, in other words, the whole surface of the land; Sheppard's Touchstone, p. 96: and such grant would be binding upon his heirs and all claiming under him; and, if so, why may he not grant the mines below, his remaining estate being burthened with any inconvenience or loss consequent upon subsidence of the surface by reason of the working of them? In the present case, the Commissioners and Samuel Pears, in the same instrument by which the former executed their powers, the latter under his hand and *seal, for a valuable consideration to himself, [*151 declared that the mines below the land allotted to him should belong to Henry Howlette in fee simple, and his own lands be subject to the incident or quality that the owner of the mines should not be responsible for any injury to the surface consequent upon the working of them. In my opinion, the incident was lawfully created, and attached to the estate of Samuel Pears; and that he and all persons claiming under him took the estate subject to it.

The cases of *Harris v. Ryding*, 5 M. & W. 60,† *Humphries v. Brogden*, 12 Q. B. 739 (E. C. L. R. vol. 64), *Smart v. Morton*, 5 E. & B. 30 (E. C. L. R. vol. 85), and a late case of *The Caledonian Railway Company v. Sprot*,(a) in the House of Lords, show what are the rights of support, both subjacent and adjacent, existing of common right, and upon the construction of ordinary grants and exceptions in conveyances. And I cannot perceive any reason, either at law or otherwise, why parties should not be at liberty, by apt words, either to add to, or qualify, or make more or less extensive, the right which the law of itself provides and imposes, or, if they think fit, declare that such rights shall not exist at all. "*Quilibet protest renunciare juri pro se introducto.*"

I think these are the true legal grounds upon which this case rests, and not upon the principle applicable to easements and servitudes; as, in my opinion, the general right which a man *primâ facie* has at common law to the support of his land, either subjacent or adjacent, is a natural right analogous to the right to flowing water, and not an easement.

*WILLIAMS, J.—After much consideration, and not without [*152 difficulty, I have come to the conclusion that the decision of the Court of Queen's Bench in this case is right.

(a) 2 Macq. Reports of Scotch, &c., Cases, in the House of Lords 449.

The difficulty has arisen in my mind, principally, from my being unable to concur with the judgment of that Court in treating the right to support from the subjacent minerals, to which the owner of the surface of land is entitled when the surface and the minerals are held as separate tenements by several owners, as an easement. It is, I apprehend, in its nature, one of the ordinary rights of property, and not an easement, which is a right accessorial to those ordinary rights.

I have, therefore, felt no little weight in the objection made by the counsel for the owner of the surface in this case, in accordance with a passage in the judgment of Lord Denman in *Hilton v. Lord Granville*, 5 Q. B. 701, 730 (E. C. L. R. vol. 48), that, if the allotment by the Commissioners to Pears, the original allottee of the land in question, is to be regarded as a grant to him of the surface with a restriction from the enjoyment of one of the ordinary rights annexed by law to the subject of the grant, such a restriction is repugnant and void. But it cannot, I think, be doubted that, if an owner of land with subjacent mines were to grant away the mines together with the power of winning the minerals, without regard to any injury done thereby to the surface, such a grant would be good, and would bind the inheritance, and his estate in the surface would pass to his assigns abridged, to that extent, of the right of support from the minerals, whatever the nature of that right may be. Hence it seems to follow that it is competent for the *153] owner of the surface of land *effectually to curtail, by grant in favour of the owner of the subjacent mines, the right to support therefrom.

In the present case, however, it is objected that, even if this be so, generally speaking, yet in this particular case the Commissioners had no power, under the enclosure Act, to sever the surface from the minerals; still less to allot an estate in the surface divested of any of its ordinary rights. But I think a sufficient answer to this objection is to be found in the fact that Pears executed the deed of conveyance to him by the Commissioners; and its language is such that, in my opinion, it may be construed, not merely as an acceptance of the abridged estate by Pears, but as a grant by him, in itself curtailing his estate in the surface in favour of the owners of the mines.

CROWDER, J.(a)—I am of opinion that the judgment below ought to be affirmed. The plaintiff, who is the owner of certain surface land, has brought his action against the defendant, the owner of the subjacent mines, for an injury to the surface land by reason of the subsidence caused by the ordinary operation of mining. It is admitted that the mines have been worked with ordinary skill and care, the complaint being that the subsidence is the natural consequence of the fair working of the defendant's mines in the accustomed manner. Had there been no other evidence in the case than the plaintiff's possession of the surface and the defendant's possession of the mines beneath, the learned counsel for the defendant admitted that, according to the authority of *Humphries v. Brogden*, 12 Q. B. 739 (E. C. L. R. vol. 64), which he did not question, *154] *this action would have been maintainable. Because, if nothing more appeared than the contiguity of ownership of land horizontally, the owner of the superincumbent soil would have a right to support from the owner of the subjacent mines. But, in the present case,

(a) This judgment was read by Williams, J.

the creation of both estates is shown. The plaintiff claims under one Samuel Pears; and the defendant has the mines which formerly belonged to one Henry Howlette. And, in the year 1770, by the award of Commissioners appointed under an enclosure Act, the surface was allotted to Samuel Pears and the mines to Henry Howlette. It further appears that all the allottees were made parties to the award, and were intended to execute it as a deed. In fact, however, Samuel Pears and only some other allottees did execute it; but Henry Howlette did not. But both Samuel Pears and Henry Howlette took their several allotments under the award. In the award is an allegation that the surface and the mines were allotted to different persons for convenience; and there is a covenant by the allottees of the surface to the effect that the mines allotted should be worked and gotten by the owners without being subject to any action for damages on account of working and getting the said mines, or for or by reason that the surface may be rendered insecure and injured by such working, the parties thereto "being willing and desirous, to accept their respective allotments," "subject to any inconvenience or encumbrance which may arise from the cause aforesaid."

It was contended, by the plaintiff's counsel, that the award of the allotments was altogether bad, as exceeding the powers of the Commissioners, who could only allot the land vertically and not horizontally: and, further, *that the execution of the instrument by Samuel Pears was inoperative as to the mines of Howlette, because [*155 Howlette did not execute it. And it was further contended that, even assuming the execution of the instrument by Samuel Pears to be binding upon him individually, as a covenant not to sue, it did not run with the land, and could not bind the present plaintiff.

I think it is not material to the decision of this case whether the award be valid or not. Because, assuming the allotments to have been made in a manner not authorized by the enclosure Act, it is clear that Pears and Howlette accepted their allotments upon the terms specified in the award; and that Pears, by executing the instrument as his deed, expressly recognised those terms as binding upon himself, his heirs and assigns. Now, although it is clear that a mere covenant not to sue will not run with the land, it is equally clear that a release of an easement or of a right incident to an estate is binding upon those to whom that estate comes. The Court of Queen's Bench has decided that the right to support is an easement annexed to the surface land, and was relinquished in part by Samuel Pears, so that he took his estate with a qualified instead of an absolute right to support. Perhaps the right to support may be more properly designated as a right of property incident to the enjoyment of the estate than as an easement. But, whichever it is, it may be wholly or partially relinquished by release. And I think Samuel Pears, by taking possession of the allotment and executing the award containing the covenant above referred to, did in effect accept his surface land with a right of support to a limited extent only, instead of the absolute right of support naturally incident to his estate as surface land. *And I think that the present plaintiff, claiming [*156 under Samuel Pears, takes the same estate as Samuel Pears took, with the limited right of support only from the subjacent mines. And, if so, there has been no injury to the plaintiff of which he can

legally complain; and the present action is not maintainable against the defendant.

CRESSWELL, J.—In this case I am of opinion that the judgment of the Court of Queen's Bench should be reversed.

The circumstances of the case are very peculiar; and it is not likely that the decision in this case can be made a precedent for any other: and I much regret that I have been unable to convince myself that the decision of the Court below was not erroneous. But, unfortunately entertaining an opinion that it is so, I feel bound to state it, and my reasons, although it can have no effect upon the judgment of this Court.

On the argument before us, the counsel for the defendant contended that the plaintiff could not recover in this action unless he established that he had a right to an easement in the defendant's land, availing himself of the ground on which the Court below appears to have placed its judgment; and that the plaintiff never had such easement, having renounced or released it at the moment when the surface was given to him by the award. I agree that neither the plaintiff nor his predecessor in title, Pears, had any easement in or over the land of defendant or his predecessor in title, Howlette. Until the award was made, the surface and mines were in the same person. Therefore no easement could then exist. The allotment of the surface to Pears being made, under *157] the supposed authority of an Act of Parliament, by the Commissioners acting in execution of the statute, and not by the owner of the mines, they could not and did not affect to give him any easement; and, as far as the question of easement is concerned, it was unnecessary that Pears should renounce or release it; for he never had it, and therefore had nothing to release. What then was the real position of the two parties, owners of the surface and mines underneath, respectively? By virtue of the award, independently of the covenant entered into by Pears, each had the ordinary rights which the owner of any fixed property has over that which is exclusively his; but (as was well observed by Maule, B., in *Harris v. Ryding*, 5 M. & W. 76,†) the rights of a man over his exclusive property are not unlimited, but are limited by the duty of so using it as not to do any damage to the property of another person. Pears then had a right to the surface uninjured by any person, and a right to sue any person who injured it. Howlette had a right to the mines, and to use them as he pleased, provided he did not, by so using them, injure the property of Pears. And that right of Pears to sue for an injury done to his land was a right given to him by the common law, as owner of that land, and not as being entitled to any easement in or over the mines below it. An easement must be an interest in or over the soil; but the owner of the mines might have removed every atom of the minerals without being liable to an action if the soil above had not fallen. So, if the superincumbent strata rested on the minerals, he might have abstracted them, and substituted stone, or brick, or any other substance, and would not have incurred any liability if the *158] surface had not sunk. In such case the consequential damage is the cause of action; and the Statute of Limitations would run only from the time when the injury was sustained, and not from the time when the act was done: *Roberts v. Read*, 16 East, 215.(a) The award

(a) See *Bonomi v. Backhouse*, in Q. B., Trinity Term, 1858.

then cannot be treated as a grant of the surface with a qualified easement of support from the mines below.

It may be well doubted whether the award of the Commissioners was a valid execution of the power vested in them; for the Act did not in terms, nor can I discover that it did by implication, give them power to award the surface to one and the mines to another, or to make any allotments without the rights annexed by law to the ownership of property: nor did the Commissioners assume to act in execution of any such power as that last suggested; for they simply allotted to Pears certain lands and certain mines under other lands, which they "adjudge to be equal in value to the mines which the said Samuel Pears was possessed of in the said open fields before the enclosure thereof, without being entitled to any part of the mines under his own allotment of land laid out for him as aforesaid; which last-mentioned mines are hereby before awarded to the said Henry Howlette." The award then does not affect to give to Howlette any particular privilege, or any unlimited right to work the mines, nor to take away from Pears any rights incident by the common law to the ownership of real property.

The argument for the defendant must therefore depend upon the covenant entered into by Pears and others, "that the said mines so allotted under the circumstances aforesaid shall or lawfully may for ever after *be held and enjoyed by the respective persons to whom [*159 the same are assigned, according to the true intent and meaning of this award, and by them and every of them be worked and gotten accordingly, without any molestation, denial, or interruption of any other person or persons parties to these presents, and those claiming under them, respectively, who, for the time being, are or may be owner or owners of the surface of the lands under which such mines are situate, and without being subject or liable to any action or actions for damage on account of working and getting the said mines, for or by reason that the surface of the lands aforesaid may be rendered uneven and less commodious to the occupiers thereof by sinking in hollows, or being otherwise defaced and injured, where such mines shall be worked." It has been said that this covenant may operate as a grant by the owner of the surface to the owner of the mines of the right to work them, and, by working, to cause the fall of the superincumbent strata. And that such grant would be grantable over.

It is unnecessary for me to consider whether there is any weight in the argument, urged for the plaintiff, that the defendant cannot take advantage of that covenant, Howlette, his predecessor in title, not having executed the award; for I am of opinion that, if he had executed it, the covenant could not have operated as such grant. This appears very clearly from the learned judgment of Littledale, J., in *Moore v. Rawson*, 3 B. & C. 332, 339 (E. C. L. R. vol. 10), where he enters at large into the doctrine of easements, and the manner in which they may be acquired, and points out the distinction between them and other rights, such as the right to *light and air, which are not the [*160 subject-matter of a grant. It would give no interest of any kind, corporeal or incorporeal, in the covenantor's land. It is not a covenant that he would do or abstain from doing any act on his own land. Notwithstanding the covenant, if the covenantee touched the covenantor's land, he would be a trespasser: if, by negligent working

his mines, he caused the surface to sink, he would be liable to an action on the case. It would not enlarge any right that he had before in his own mines, but would simply furnish him with an excuse in the event of his causing injury to the covenantor's land. It might possibly be construed as a grant of a license or authority to the covenantee; but, not conferring any interest, that would not be grantable over: Shep. Touchst. tit. *Of a Grant*, 238, 9. But it might with greater propriety be called "a covenant not to sue," which would be personal to the covenantee, and not grantable over. It could not operate as a release of any right of action that might afterwards accrue; for a right of action cannot be released by anticipation: Shep. Touchst. tit. *Of a Release*, 340, 1.

For these reasons, it appears to me that the covenant entered into by Pears did not operate as a release of any easement or other right in the mines allotted to Howlette; that it did not operate as a grant of any interest in the lands allotted to the covenantor Pears; that it could have no other or larger effect than a covenant not to sue for, or a license to cause, an injury to the surface, which would be personal to the grantee or covenantee and not assignable over: and, consequently, that the covenant furnishes no answer to the action brought by the assignee of Pears against the assignee of Howlette Judgment affirmed.

161*] *TRAHERNE and PARRY v. GARDNER and NEWMAN.
July 4.

Debt for money had and received, in respect of sums paid, under protest, on the admission of plaintiff to copyhold premises, alleged to be charged in excess. Plea: Never indebted. The particulars of demand consisted of eleven items, amounting in all to 17*l.* 1*s.* On a case reserved, it appeared that plaintiff insisted that the principle on which the fees were charged was faulty, of which opinion was the Court in some instances, but not all: and they directed that the Master should reduce the charges, by allowing only a quantum meruit in respect to the greater part of the charges. On one item, 3*s.* for proclamations, the Master allowed the whole charge: on three items, he disallowed the charge altogether: and in all the others made a reduction: the whole reduction of defendant's charges amounted to 9*l.* 1*s.* 4*d.*

Held: that the defendants were entitled to have the verdict entered distributively, viz.: as to 9*l.* 1*s.* 4*d.* for the plaintiff, and as to the residue, 7*l.* 19*s.* 8*d.*, for the defendant: and that each party was to be allowed on taxation his costs in respect of so much as he had succeeded upon.

WILDE, in last Easter Term, obtained a rule calling on the defendants to show cause why the Master should not be at liberty to review his taxation of costs in this case.

From the affidavits on which the rule was obtained, it appeared that the declaration contained only the common counts in *Indebitatus assumpsit*, for money paid by the plaintiffs for the defendants, for money had and received by the defendants for the use of the plaintiffs, and on an account stated. The defendants pleaded *Never indebted*; and on such plea issue was joined. The plaintiffs delivered particulars of demand, of which the following is a copy.

"This action is brought to recover the sum of 17*l.* 1*s.*, being fees paid on the admission of the plaintiffs as devisees of John Gilbert Royds, deceased, to copyhold premises in the manor of Cheltenham, of which

manor defendant Gardner is lord, and defendant Newman is steward;
viz.,

	£	s.	d.
Proclamations	0	8	0
Court fees as on the surrender by the late John Gilbert			
Royds to the use of his will	2	16	10
Excess of fee on first admittance	0	6	8
Court fees on second admittance	3	3	6
Homage and crier	0	4	6
Stamp and parchment	1	5	0
Court fees on third admission	3	3	6
Homage and crier	0	4	6
Stamp and parchment	1	5	0
Court fees on fourth admission	3	3	6
Stamp and parchment	1	5	0
Total	£17	1	0"

The action came on for trial at the Gloucester Spring Assizes, 1853, before Williams, J., and a special jury, and was in part heard; when a verdict was found, by consent, for the plaintiffs, subject to the opinion of this Court on a special case, which was drawn accordingly, and signed by counsel on behalf of plaintiffs and defendants. The points in question in the cause, as opened by the counsel for the plaintiffs at the trial, and those subsequently submitted on the plaintiffs' behalf to this Court in the said special case, were in effect identical, and were as follows.

1. Whether the lord was bound to admit the plaintiffs, the devisees of John Gilbert Royds, to the four copyhold tenements, parcel of the manor of Cheltenham, of which said Royds died seised, by one admittance, and on payment of one set of fees. 2. Whether the lord was bound to admit the plaintiffs on payment of one admission *stamp. 3. Whether the lord was bound to admit them by two admissions, and, in that case, on payment of what fees and stamp duties. 4. Whether the lord was entitled to require four admittances, and, in such case, upon payment of what fees: and the said special case provided, as to this point: If the Court should be of opinion that the lord was so entitled, but that the fees demanded and paid were excessive, then the verdict was to be entered for the plaintiffs for the amount overpaid, and the Court was to have power to refer the fees to the Master. 5. Whether the steward was entitled to charge any and what fee as on a surrender to the use of the will of the testator. The said special case provided, as to this point: If any excess taken, the verdict to be entered for the plaintiffs for such excess. 6. Whether the steward was entitled to a separate fee on the admission of each joint tenant: if not, the said special case provided the verdict to be entered for the plaintiffs in respect of a sum of 6s. 8d. charged for each admission of defendant Parry as joint tenant. [*163]

The plaintiffs, with a view to the trial, gave notice to the defendants to produce the court rolls and muniments of the manor; and the plaintiffs were fully prepared, from such rolls and muniments, if produced, or by secondary evidence, if not produced, to have supported their view of each of the said points in dispute. The special case, and appendices

therein referred to, contained a statement and arrangement of such evidence, and of additional evidence bearing on the same points, the result of further examination of the said rolls and muniments of the manor. The special case did not raise any point for the plaintiffs not taken or intended to be taken at the trial.

*164] The briefs used for the plaintiffs at the trial contained a calculation of the fees to which the plaintiffs contended that the steward was entitled, supposing him to be justified in requiring four separate admittances; the result of which differed by only a few shillings from the sum to which the Master adjudicated that the steward was entitled, as after mentioned. The same briefs also contained *vivâ voce* evidence, by witnesses present at the trial, in support of the calculation. The special case was argued in this Court in Hilary Term, 1856, (a) when the Court decided for the plaintiffs, on a preliminary objection by the defendants that money had and received would not lie: as to points 1, 2, and 3, for the defendants: as to point 4, that the lord was entitled to require four several admittances, but that there was no customary fee to justify the amount claimed and paid; and that such amount was excessive: and it was referred to the Master to settle the proper fees on the principle of quantum meruit: as to point 5, that the steward was entitled to some fee as on a surrender to the use of a will, but the amount thereof was to be settled by the Master: and, as to point 6, that the steward was not entitled to a separate fee on the admission of each joint tenant. And the Court made the following rule: "It is ordered that the verdict be entered for the plaintiffs for such amount as shall be ascertained by one of the Masters of this Court."

On the said reference, the Master decided that the plaintiffs were entitled to a verdict for 9*l.* 1*s.* 4*d.* His calculation was as follows.

	Sums sought to be reco- vered back.	Sums which ought to have been charged.	Sums to be recovered back.
	£ s. d.	£ s. d.	£ s. d.
"Proclamations	0 3 0	0 3 0	
Court fees on surrender to use of will	2 16 0	0 9 8	2 7 2
Excess of fee on first admission	0 6 8	nil	0 6 8
Court fees on second admission	3 3 6	1 7 0	1 16 6
Homage and crier	0 4 6	nil	0 4 6
Stamp and parchment	1 5 0	1 2 0	0 3 0
Fees on third admission	3 3 6	1 7 0	1 16 6
Homage and crier	0 4 6	nil	0 4 6
Stamp and parchment	1 5 0	1 2 0	0 3 0
Court fees on further admission	3 3 6	1 7 0	1 16 6
Stamp and parchment	1 5 0	1 2 0	0 3 0
Totals	17 1 0	7 19 8	9 1 4"

Accordingly, the *postea* was endorsed on the record, finding that the defendants were indebted to the plaintiffs as alleged, and assessing the damages to 9*l.* 1*s.* 4*d.*

The Court, on the motion of plaintiffs, had granted a rule for taxation of costs on the higher scale. The attorney for the plaintiffs, on the taxation, claimed to be entitled to the general costs of the cause, including the special case and appendices, of the hearing of the special case,

and reference to the Master to ascertain the amount for which judgment should be signed. The Master decided that the plaintiffs were entitled to the general costs of the cause up to the trial, but to so much only of the special case, appendices, and costs of the hearing of the special case, as applied to the points of the special case found for them.

The defendants claimed to be allowed the costs of such of the points set forth in the special case as had been decided in their favour, either wholly or in part, and of the appendices which, in their view, bore thereon. *The Master decided that the defendants were entitled to the costs of so much of the special case, appendices, and hear- [*166 ing of the special case, as applied to the points found for them, upon the ground that, although there was but one issue raised by the pleadings, yet that such issue was divisible; and that the questions for the opinion of the Court stated in the special case must be considered as separate issues and treated accordingly. He taxed the costs of the plaintiffs and defendants according to this view: and the following is a copy of his allocatur.

	"9 . 1 . 4	Plts. costs	£382
	2 .	Defts. costs	209
Increased costs	171 .		
			<hr/>
			173."
Dam ^s . in all	182 . 2(a)		

It appeared, from the affidavits in opposition to the rule, that the plaintiffs, before the commencement of the action, had made the payments, of which they complained, under protest. The same affidavits set forth the grounds on which the defendants had insisted on the taxation, to the following effect. That the plaintiffs had merely succeeded upon a question of quantum meruit: that, on their application for admission, they did not object to the fees on the ground of excess; nor did they by their protest or their particulars of demand; for they did not attempt to disturb the amount paid upon their first admission, but sought to get back the entire of the fees and stamps on the three other admissions, the entire of the fee on the surrender to the use of the will, and the entire of the fee of 6s. 8d. for each *joint tenant: and, so [*167 far as regarded the fees and stamps on those three admissions, these were sought to be recovered back upon the ground that there was a custom in the manor to admit to several tenements by one admission and on payment of one set of fees: and that alleged custom was the great question that they went to Gloucester to try, in order to establish it. That the question as to a fee on a surrender to the use of a will was also as to the right to charge any fee at all, and not the amount; and, therefore, that the plaintiffs were not entitled to any of the costs of the briefs at the trial that related to the question of custom, and not to any of the costs of the special case; for, if they had gone to trial simply on the question of reasonableness of the charges, no special case would have been necessary. The Master, however, decided that, as the plaintiffs were entitled to the costs of the cause, they were entitled to the costs of the special case, so far as they had succeeded upon it, and also to portions of the appendices of fees. It was also contended, on behalf

of the defendants, that they had been entirely the successful parties upon the special case, upon their view of what the plaintiffs went to trial for, and were entitled to the whole of the special case and appendices: or that, at all events, as the general issue was distributable, and several distinct issues were raised by the case, the defendants were entitled to have their costs of so much of the special case and appendices as they had succeeded upon as against the plaintiffs: and this view of it the Master adopted; and the taxation proceeded upon this principle. It was also objected, on the part of the defendants, that the plaintiffs were not entitled to the costs of the reference, nothing being said in the *168] special case (being in fact the agreement of reference), *or in the rule of reference to the Master. But the Master was of opinion that they were costs in the cause, and followed the general costs, to which the plaintiffs were entitled.

That the result of the taxation was as follows.

The plaintiffs were allowed the costs of the cause, up to and inclusive of the trial, except such parts of their briefs as related to the custom or right to be admitted by less than four admissions; the costs of such parts of the special case as the Master estimated they had succeeded upon; also of such parts of the appendices as related thereto; and the whole of the costs of settling the special case, and which were considerable; the costs of the argument apportioned according to their success; and the whole costs of the reference.

The defendants: no part of the costs of the trial; the costs of such parts of the special case as were not allowed to the plaintiffs; and one fee to counsel on drawing and settling; the costs of such parts of the appendices as applied to the parts of the special case decided in favour of the defendants, and which very far exceeded the allowance of appendices to the plaintiffs.

The affidavits further set forth grounds upon which the defendants contended that the taxation had been unfavourable to them. And it was submitted that, if necessary, the *postea* should be amended, finding for the defendants for the excess of the claim beyond the 9*l.* 1*s.* 4*d.*

In last Term, (a)

*169] Sir *F. Kelly* and *Phipson* showed cause.—The Master *was right in considering the issue on the claim for money had and received to be divisible. It raised six distinct questions, (b) each of which, to some extent, was compounded of law and fact, besides the general question whether the overpayments could be recovered in an action for money had and received. The judgment of the Court was that the overpayments were to be recovered, the amount to be settled by the Master. It must be contended, on the other side, that, whatever be the practical number of issues, the plaintiff is entitled to full costs on all, if he succeed as to a single one. Had the case been tried by a jury, numerous questions must have been left to them, upon each of which there must have been distinct findings. By sect. 75 of The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), “Pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively, and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved

(a) June 9th, 1857. Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, Js.

(a) See 5 E. & B. 929 (E. C. L. R. vol. 85).

(b) 3 B. & Ad. 385 (E. C. L. R. vol. 23).

shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered." And, by R. G. Hil. 2 W. 4, i. 74,(a) "No costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." On a plea of *Nunquam indebitatus* to a count for money had and received, the title to tolls, or to an office, or to the rents of an estate, might be tried; but the plaintiff, *though he succeeded in establishing his right, ought not to recover full costs if he claimed an excessive sum, and the defendant succeeded in reducing it, though he should fail in resisting the claim of right. Suppose a claim for toll, and the toll to be established, but the amount reduced from 4*d.* to 3*d.*: the real question might be on the general right: but if so, that could be ascertained on taxation, and the costs be allowed accordingly. [Lord CAMPBELL, C. J.—There might be a verdict for the plaintiff as to so much, parcel, &c., and for the defendant as to the residue.] There might. [Lord CAMPBELL, C. J.—You say then that the Master here, though the record was not in that form, was bound to inquire what, in substance, were the issues, and how found. CROMPTON, J.—The plaintiff, I suppose, says that he seeks to recover a certain sum; and that the result is to be taken as if a jury had found that he was entitled to recover a smaller sum, not that each party had succeeded in part. The plea might separate the issues. In *Cousins v. Paddon*, 2 C. M. & R. 547,† the pleas had not done so; but the Court ordered the verdict to be entered distributively: that, however, was not universally approved of.] It would often be very inconvenient, if not impossible, to make the separation by way of a plea: yet surely the defendant ought not to suffer from that. [COLERIDGE, J.—I do not see how, in such a case, the Master can act upon sect. 75 of The Common Law Procedure Act, 1852. CROMPTON, J.—In *Gabriel v. Dresser*, 15 Com. B. 622, 627 (E. C. L. R. vol. 80), Jervis, C. J., points out that sect. 75 applies only to issues joined upon allegations in pleas, such as payment and set-off. The Legislature never meant to enact that a declaration should be distributed.] *The section says, "all other pleadings capable of being construed distributively:" why is the plea of *Never indebted*, when pleaded to a count for money had and received, incapable of distribution? Or why is the count itself not one of the "pleadings" capable of distribution? [COLERIDGE, J.—Read on: the section speaks of "so much thereof as shall be sufficient answer to part of the causes of action proved." CROMPTON, J.—It was a very convenient practice to look at the particulars as incorporated in the declaration: however it is now ruled that this cannot be done. Lord CAMPBELL, C. J.—Looking only at the record, I do not see where we are to divide.] The plea of *Nunquam indebitatus* is at any rate distributable. In *Prudhomme v. Fraser*, 2 A. & E. 645 (E. C. L. R. vol. 29), the plea of *Not guilty*, to a count for libel, was distributed so far as regarded the taxation of costs. *Anderson v. Chapman*, 5 M. & W. 488,† was a case under the rules of H. 2 W. 4. It was an action for a breach of contract: the defendants succeeded in disproving most of the alleged damage; but the breach of contract was proved: and it was held that they could not insist on a verdict or costs in respect of the part of the

(a) 3 B. & Ad. 385 (E. C. L. R. vol. 23).

damages which was disproved. But it is clear, from the language of the Judges there, that, when the plaintiff goes in fact for two causes of action, and fails as to one, the issue may be distributed; and that the effect of R. G. Hil. 2 W. 4, i. 74, is that, if the plaintiff fails either as to one entire cause of action, or a distinct part of one, the defendant is entitled to costs as to that. Accordingly the declaration was distributed in *Williams v. Great Western Railway Company*, 8 M. & W. 856,† and *172] *Welby v. Brown*, 1 Exch. 770:† and so was the claim, on a case *stated without pleadings, in *Elliott v. Bishop*, 10 Exch. 522,† under the Common Law Procedure Act, 1852. [CROMPTON, J., referred to *Phythian v. White*, 1 M. & W. 216.† ERLE, J.—In the R. G. H. 4 W. 4, *Pleadings in Particular Actions*, v. 6,(a) it is laid down that “in all actions in which such right of way or common as aforesaid, or other similar right is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.” The words “other similar right” here follow two instances of rights in a very narrow sense. There was much discussion on this rule before 1852: it was, however, held to be applicable to declarations.(b) There is, on the other side, the difficulty pointed out by my brother Coleridge as arising upon the language of sect. 75 of The Common Law Procedure Act, 1852. CROMPTON, J.—It was also held that the distribution must appear on the face of the record.(c) I apprehend that at common law the plea could always expressly distribute the declaration.] In *Doe dem. Errington v. Errington*, 4 Dowl. P. C. 602, Coleridge, J., held that the declaration in ejectment might be distributed. [CROMPTON, J.—There the particulars showed three portions of land, two freehold and one copyhold.] But the judgment refers generally to a declaration for several messuages or closes. In *Cox v. Thomason*, 2 C. & J. 498,† a single plea was, in form, pleaded to a declaration containing several counts; and it was held that this, for the purpose of costs, under the rules of H. 2 W. 4, was to be treated as *173] pleaded separately to *each count. The cases will be found collected in Gray’s *Treatise On the Law of Costs*, p. 40—64. In *Routledge v. Abbott*, 8 A. & E. 592 (E. C. L. R. vol. 35), the count alleged an entry of plaintiff’s house and taking his goods; a plea denied that the house and goods were plaintiff’s: the jury found that the house and some of the goods were plaintiff’s, not the rest of the goods: this Court, under the rules of H. 2 W. 4, directed the verdict to be entered distributively, and the costs to be apportioned accordingly. [ERLE, J.—In the judgment of the Court of Exchequer in *Cousins v. Paddon*, 2 C. M. & R. 559,† the Court, adverting to the old practice in the case of pleas of set-off, the statute of limitations, and bankruptcy, pleaded to indebitatus assumpsit, says: “this can only be on the ground that such pleas, to a declaration of this general nature, which may and often does comprise many distinct contracts in point of fact, are capable of being severed, and applied to each portion of the demand, in like manner as if there were several distinct pleas, one to each of such portions respectively.” Therefore it is assumed that the general count of indebitatus assumpsit is capable of being analyzed. CROMPTON, J.—I thought that

(a) 5 B. & Ad. z. (E. C. L. R. vol. 27).

(b) See *Giles v. Groves*, 12 Q. B. 721 (E. C. L. R. vol. 64).

(c) See *Bird v. Penrice*, 6 M. & W. 754.†

decision a very valuable one: but all the Courts have since held that a plea of payment is not distributable. It has been said that the object of sect. 75 of The Common Law Procedure Act, 1852, was to restore *Cousins v. Paddon*, 2 C. M. & R. 547.†] In sect. 81 of stat. 15 & 16 Vict. c. 76, it is "provided that the costs of any issue, either of fact or law, shall follow the finding a judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues." That, *it is true, follows the enactment allowing several [*174 matters to be pleaded at any step of the pleadings: but the word "issue" is general. In the present case, the expense was mainly incurred in the contest as to the amount, not as to the right to recover something.

Wilde, contra.—The question of divisibility cannot be raised under the present circumstances. As to every item in the particulars, except the item of 3s. for proclamations, the plaintiffs have made out their claim; only they have not made it out to the full extent specified in all the items. It is not as if there were a failure as to the whole of a particular item. Suppose an action for the prices of a horse and a cow sold by plaintiff to defendant; and that there arose, on a plea of *Nunquam indebitatus*, three questions as to the horse; namely, the fact of sale, the authority of a person professing to act as defendant's agent for the purchase, and the value of the horse; but that, as to the cow, there was but one question. The verdict might separate the horse and the cow; but it could not separate the three questions as to the horse. So here the question as to the surrender may be separated from the question as to the admittance; but those two questions cannot themselves be subdivided. It is true that the defendant might, if he had so chosen, have subdivided them by his pleading; but this he has not chosen to do. It does not follow that, because the issue taken involves a certain number of propositions, it involves that number of issues. Suppose the issue taken to be expanded on the record: it would constitute an issue, first, as to the first fee; next, as to the second; and so on. But the attempt is to expand such supposed *issues by a fresh [*175 subdivision. On each of such issues the defendant must be taken to have failed, as having unlawfully exacted too much. How great the damage as to each particular exaction was, is a question on which there could be no issue. It is, to adopt the illustration on the other side, as if a man were sued for exacting a toll to which he had no right, and it appeared that he had no right to the toll which he did exact, though he had a right to a less toll: in such a case he would fail generally. [ERLE, J.—In *Cousins v. Paddon*, 2 C. M. & R. 559, 560,† the Court points out that, as it was no longer necessary in an action of debt on simple contract to prove the exact amount claimed, so it was fair to treat the denial of the debt as divisible.] The question here is not as to the amount of a debt, but as to the measure of damages in a case where the defendant is a wrongdoer. [ERLE, J.—You offer a very technical answer to an argument founded on a suggestion of what is fair and reasonable. CROMPTON, J.—I own that I cannot see, as to this, how to distinguish between debt and *indebitatus assumpsit*.] Suppose an action for 120*l.*, as the price of a horse, and the jury find the price to be 20*l.* only. [ERLE, J.—Suppose the plaintiff to sue for so much, as the sum bargained for in respect of the keep of a horse; and the jury

negative that bargain, but give a smaller sum as a quantum meruit.] There the defendant might succeed, on the ground that the plaintiff was not entitled to the sum named: so here the defendant fails because he was not entitled to the sum which he exacted. [ERLE, J.—Suppose he had paid money into Court.] That is what he should have done: the plaintiff might then have abandoned the rest of the claim. The principle of *Anderson v. Chapman*, 5 M. & W. 483,† applies *exactly. *176] [CROMPTON, J.—It is true that there a very great part of the controversy was on the part as to which the defendants succeeded.] It was so. What is the sum which the plaintiff is supposed to go for? That which he claims in the declaration, or that on which he insists at the trial? Here, in fact, he insisted on the whole claim to the last. [CROMPTON, J.—Very often the plaintiff claims the same sum in different ways: it seems impossible to say that, if some modes of claiming it fail, there is to be a verdict as to part for the plaintiff and as to the residue for defendant.] In *Delisser v. Towne*, 1 Q. B. 333 (E. C. L. R. vol. 41), the plaintiff sued defendant for a malicious prosecution for perjury; and it appeared by the declaration that the indictment, in the prosecution, had contained several assignments of perjury: the want of probable cause was proved as to one assignment only; and damages were given for this only: but it was held that the defendant could not have his costs in respect of his witnesses brought, and expenses incurred, as to the other assignments. But, further, suppose the issue to be distributable: the time for distributing is gone by. The parties agreed to a case on the assumption that the issue was on the general denial: it by no means follows that they would have so agreed if there had been a distributive issue. The costs of the special case itself are like the general costs of the trial: the plaintiff here must have them. [ERLE, J.—Under the old practice, the jury might have found the facts specially: now the questions are raised by statements supposed to be made in good faith.] There has been an actual trial. On a special verdict, the plaintiff would have had the costs of the cause. In *Biddulph v. Chamberlayne*, 17 Q. B. 351 (E. C. L. R. vol. 79), a plea to a count for libel *justified *177] a part of the libel; the part justified contained several allegations; some, upon the jury being asked severally as to each by the Judge, were found to be true, and these important ones; some were found to be false: this Court refused to disallow the plaintiff his costs of witnesses called solely to disprove the truth of the allegations which in the event were found to be true.

Cur. adv. vult.

COLERIDGE, J., now delivered the judgment of the Court.

This was an action for money had and received, to recover back several distinct fees paid by plaintiffs, under protest, on admissions to copyhold premises. The claim of the plaintiffs in the declaration was for 50*l*. The plea was, Never indebted. On the trial, a special case was stated for the opinion of this court. We gave judgment, to a certain extent, for the plaintiffs, determining, however, several important questions reserved in the case in favour of the defendants. The plaintiffs had demanded in his particulars 17*l*. 1*s*., relying on about five distinct items; and he recovered something on each item, though on several the amount was reduced by the success of the defendants. Practically, each party succeeded in maintaining important positions. And the plaintiffs ultimately were entitled to judgment for a considerably less sum than

that which they had claimed. The Master taxed on the principle of allowing costs to the defendants where they had in part successfully resisted any claim in respect of the part so resisted. And the question now before us arises on a motion for the Master to review his taxation, on the ground that the defendants *were not entitled, on the [178 above state of the proceedings, to any such allowance of costs.

It is quite clear, and was conceded on the argument before us, that a defendant can be entitled to no costs unless there is a judgment for him, or a finding for him on some issue or part of an issue. And the present question really amounts to this: whether the defendants were entitled to have a part of the issue entered for them, on which finding costs of maintaining so much of it could be taxed for them.

Great reliance was placed, on the argument for the defendants, upon the 75th section of The Common Law Procedure Act, 1852, by which it is enacted that "pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively." We do not, however, think that the case at all depends upon that section. That section forms part of a series, which, by its special preface, is confined to pleas and subsequent pleadings: and the words we have quoted from the 75th section are followed by these: "if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury." These considerations show clearly that the section was intended to relate to those cases where pleas or subsequent pleadings are denied, and part of them, sufficient to cover in part the declaration or preceding pleading, is proved, and not to apply to cases in which the declaration itself is denied. Great difficulties had arisen as to pleas of set-off and other similar pleas, where, on the evidence, so much was proved as would answer a part only of the declaration: and the object of the statute was to meet *such cases as *Tuck v. Tuck*, 5 M. & W. 109,† where, [179 the defendant proving his set-off but not covering the whole claim in the declaration, the plaintiff was held entitled to a verdict on the whole plea. See the observations of Jervis, C. J., in *Gabriel v. Dresser*, 15 Com. B. 622, 627 (E. C. L. R. vol. 80). Probably the Legislature did not think that the case of the divisibility of issues denying the declaration required provision, there having been a course of practice, and several decisions, on the subject of finding issues distributively; some of which decisions, as observed by Mr. Gray, in his *Treatise On the Law of Costs*, p. 68, seem to have anticipated in many cases the effect of sect. 75, even as to the distribution of issues on special pleas.

When the rules of Hil. Term, 1832,(a) gave parties the costs of issues according as they were found, it became more generally important to have the findings on issues entered distributively, where capable of distribution in fact. And a practice has arisen, sanctioned by several decisions, of defendants claiming to have a verdict, judgment, and costs for the part of the declaration on which the plaintiff fails, if the declaration be capable in its nature of distribution. In many cases, from the nature of the declaration, there is no difficulty in this. Thus issues taken on pleas in denial of the whole count have been held distributable in actions of trespass and of trover for distinct specified chattels, in

(a) R. G. H. 2 W. 4, I. 74; 3 B. & Ad. 385 (E. C. L. R. vol. 23).

trespass to realty, in ejectment, in case for libel where the libellous matter is capable of separation, and in debt for work and labour. See the cases collected in the 42d page of Mr. Gray's book. In most of these cases, from the nature of the action, there seems no difficulty in *180] saying, *for example, that the defendant had converted the cow, but not the horse, mentioned in the declaration: but in the case of *Indebitatus assumpsit*, the sum in the declaration being for some purposes immaterial, and the issue of *Never indebted* having been sometimes regarded as raising the question,—does the defendant owe anything, and, if so, how much?—and the sum in the declaration being treated as meaning any sum the plaintiff may prove, it might be thought that, where the jury found the defendant indebted in a certain sum, there was no residue to find for the defendant. Certainly, until 1832, it was never thought that a defendant could say, where a verdict was found against him for less than the whole sum named, that he was entitled to a verdict for the residue. And the observations of Lord Abinger in *Bird v. Penrice*, 6 M. & W. 754,† are strongly in favour of this view. In that case the Court of Exchequer refused a rule to set aside an award, where the ground of objection was that the arbitrator had not found an issue on a plea of *Non assumpsit* to a count in *Indebitatus assumpsit* for horse-keep, work, and labour, and an account stated, distributively: and he observed that “the arbitrator was not bound to find the issue distributively. The plaintiff charges the defendant with being indebted to him in the sum of 200*l.*, but that sum is not material.” “There are no distinct issues raised on the first count. It is a single issue, raising the question whether the defendant is indebted to the plaintiff or not.” But in the antecedent case of *Cousins v. Paddon*, 2 C. M. & R. 547,† the issue on the plea of the general issue seems to have been entered distributively, and a verdict for the residue found for *181] *the defendant. And the same course was adopted in the more recent case of *Welby v. Brown*, 1 Exch. 770,† where, in an action for work and labour and on an account stated, by an attorney, the defendant pleaded three pleas, each to the whole declaration: *Never indebted*, *Statute of Limitations*, *No signed bill*: and the verdict was ultimately entered, as to the first issue, as to 1*l.* 10*s.* 3*d.* for plaintiff, as to the residue of the sum demanded for defendant; on the second, for plaintiff; on the third, for defendant. The general costs of the cause were for the defendant: but the plaintiff was allowed by the Court the costs of all witnesses who attended solely to prove what he recovered on the first issue, or to prove his case on the second issue; the defendant having the costs of his witnesses who attended *only* to reduce the plaintiff's demand on the first issue, and of those who attended to prove the third issue. This seems a clear decision in favour of the defendants here: and we think that we ought to follow it, and to hold that an issue of this kind may be treated distributively where the justice of the case requires that it should appear that the defendant has made a successful resistance as to a distinct part of the claim.

It is difficult to see, however, if this is to be done, and the plea and issue are to be treated as divisible, why a defendant may not always demand to have the residue found for him where the plaintiff demands a larger sum than he succeeds in proving. It was decided, soon after the New Rules, that the particulars are not to be treated as part of the

record for the purpose of the pleading: and the only mode of succeeding in such a *case as the present is to have so much found for the plaintiff and the residue for the defendant. Such a finding [*182 will, however, in many cases be of no consequence; as, where there has been no dispute or contention about the residue, the Master can give no costs, or only nominal costs, on such part of the record.

We should remark, however, that our decision will not extend to taxing costs of part of the defence for the defendant, in the case mentioned in the argument, where the defendant, though he has succeeded on some one or more questions, does not succeed so as to defeat any claim raised on the part of the plaintiff: as, for instance, if there were two modes in which a plaintiff could recover the same amount, and the defendant succeeds in defeating him as to one, although the greatest part of the expense has been occasioned by the question on which the defendant has succeeded, still, if the plaintiff succeeds as to the claim by proving the other part of his case, the defendant would be entitled to no verdict on any part of the sum claimed on which he could tax his costs.

It will be for the Master always to ascertain whether any and what costs have been incurred as to the part of the issue found for the defendant, and, when they can be ascertained to have been incurred relative to that only, to tax them to the defendant, though the plaintiff has succeeded, and is entitled to the general costs in the cause.

It was pressed upon us, in the present case, that, as the plaintiffs had succeeded in obtaining something in respect of all the transactions they brought forward in their particulars, the defendants could not be entitled to any costs in respect of reducing the amount: but we do *not [*183 see that this necessarily follows. When, for instance, the plaintiffs claim to have a fee calculated on a particular footing, and fail, but are still entitled to some but a lesser fee, calculated on another footing, it may be that distinct costs are incurred on that part of the case as to which the defendants succeed. And in such case, though the difficulty of the Master may be increased, we think that the principle which appears to have been acted on in the present case is a correct one.

It was said, also, that the judgment had not been given in this case for the defendants, or a verdict entered for them, for any part. But, as this ought to have been done, and might be done now, we think that we ought not to make the rule absolute on that ground. If necessary for subsequent proceedings, the *postea* may be set right in this respect; and then the question of whether a defendant can properly in such a case have a verdict for the residue would be on the record.

We think that we ought to follow the case of *Welby v. Brown*, (1 Exch. 770,†) in the Exchequer: and we accordingly discharge the rule, but without costs.

Ordered: That the rule “be discharged without costs, and that the *postea* herein be amended by entering the verdict for the defendants for the residue of the demand.”(a)

(a) The defendants took out a summons, to have the *postea* amended by entering a verdict for 9*l.* 1*s.* 4*d.* for the plaintiffs, and 7*l.* 19*s.* 8*d.* for defendants, in order that the taxation of the costs of the trial might be reviewed, and defendants be allowed a portion of their costs of the trial, the whole of which had been disallowed on the taxation. But no order was made on this summons, the plaintiffs consenting to refund 30*l.* in respect of such costs.

***184] *Case of The OXFORD POOR-RATE. July 4.**

The Court takes judicial notice that the University of Oxford is a national institution, the purposes of which are the advancement of religion and learning, Therefore it is not liable to poor-rate in respect of property occupied by it for these purposes solely.

The Bodleian Library is occupied by the University: access to it is given, under certain regulations, to members of the University and others; by statute it is entitled to a copy of any book entered at Stationers' Hall; it has an endowment for its repairs and for the purchase of books, to which purchase also members of the University contribute by fees at matriculation and on other occasions; visitors commonly pay a gratuity to the janitor. Held, that for such occupation the University is not liable to poor-rate.

The schools in which examinations are carried on, and in which is furniture for the accommodation of examiners, candidates, and spectators, are not so occupied as to cause a liability to poor-rate, although the candidates pay fees, which go in part to the salary of the examiners, the residue being furnished by the University.

The Convocation House is used by the University for conferring degrees, and for the transaction of such business as is brought before the Convocation; and in one of the rooms fees are paid on admission to the degrees, which go to the University. Held, not a rateable occupation, it being presumable that no pecuniary profit is derived to the University from the degrees. The room last mentioned is also used as the University Court for the recovery of debts: held not to be a rateable occupation.

The Old Convocation House and Law School are used, by the allowance of the University, for professors, who lecture therein and receive fees from the students: also, a fire engine is kept there. Held, not a rateable occupation.

The Sheldonian Theatre is used for the meeting of convocation, when the attendance is too large for the ordinary convocation house, for the periodical recital of prize compositions, and also, occasionally, for the academical exercises of graduates in music, in respect of which fees are paid to the University. Held, not a rateable occupation. And that it makes no difference that the University occasionally allows the use of the theatre to persons giving concerts for their own profit. But the University allows a publisher constantly to keep some of his books in a cellar of the building. Held, that this is a rateable occupation, although the publisher pays no rent.

The Ashmolean Museum is used as a laboratory and as a place of deposit of specimens of natural history, curiosities, and antiquities. Held that, so far, there is no rateable occupation. Part of it is occupied as the residence of a professor. Held, that this is a rateable occupation, it not appearing that such residence is essential to the discharge of the professor's duties.

The Clarendon Buildings are used as the University police-rooms, as cells for prisoners, and as a residence for a superintendent, whose enjoyment does not appear in fact to be in excess of the occupation requisite for the performance of his office. In part, a council of the University holds meetings. In part, the magisterial business of the University is transacted. Part is used for the registrar. Part is used as lecture rooms, and for geological specimens. Held, not a rateable occupation.

The Botanic Garden is used, by the University, for the growth of trees and plants exclusively for scientific purposes. Held, not a rateable occupation. Attached to it are residences and land occupied by the professor of botany and a gardener. Held, that such occupation is rateable.

The Taylor Institution is a building used for the teaching of European languages, and contains a library and lecture-rooms. Held, not a rateable occupation. A librarian and a porter reside there. Held, that such occupation is rateable so far as, if at all, the accommodation enjoyed is in excess of what is necessary for the performance of their public duties.

The University Galleries contain paintings, sculpture, and other works of art. Held, not a rateable occupation.

The colleges of the University are not recognised as public institutions in the sense in which the University itself is so recognised. And therefore the college, libraries, and chapels, though used exclusively for the purposes of collegiate instruction, discipline, and worship, are subjects of rateable occupation.

In the matter of a certain public local Act, &c. (17 & 18 Vict. c. ccxix., local and personal, public, "to repeal an *Act for better
*185] regulating the poor within the City of Oxford," and to grant

further and more effectual powers in lieu thereof; and also to provide for rating to the relief of the poor certain hereditaments within the University of Oxford.")

By the above Act, sect. 31, it is enacted as follows. "And, whereas the said university, and the said colleges and halls thereof, claim that certain land and buildings within or appertaining to the same are exempted by law from being rated to the relief of the poor; and the Vice-Chancellor of the said University, of the one part, and the Guardians of the poor of the several parishes aforesaid, of the other part, have agreed that a case shall be stated (to be prepared by their respective solicitors, and settled, if there should be any difficulty or disagreement, by some barrister at law, to be chosen by them for that purpose), for the purpose of obtaining the opinion of Her Majesty's Court of Queen's Bench, whether, by law, the same, or any and which of them, are or ought to be exempt from being rated to the relief of the poor: Be it enacted, That, upon such case being so stated as aforesaid, it shall be lawful for the said Court to receive and determine such case, although no appeal against any rate shall then be pending: and the decision of such Court thereupon shall be final and binding upon the parties aforesaid: and the cost attending the same shall be borne by the respective parties, and those incurred by the University, colleges, and halls, shall be paid by them; and those incurred by the said Guardians shall, when duly taxed, be paid out of the funds under their control."

*The University now claim exemption from rateability to the poor-rate for and in respect of the following buildings and land: [*186

1. The Bodleian Library; 2. The Divinity and other schools; 3. The Convocation House; 4. The Old Convocation House and Law School; 5. The Sheldonian Theatre; 6. The Ashmolean Museum; 7. The Clarendon Buildings; 8. The Botanic Gardens; 9. The Taylor Institution; 10. The University Galleries; 11. The College Chapels; 12. The College Libraries: all situate within the City of Oxford poor law union. And the Vice-Chancellor of the University, and the Guardians of the poor of the parishes of the said Union, therefore, in pursuance of the above section, now agreed in stating for the opinion of the Court of Queen's Bench the following case.

The buildings and land above mentioned form parts of the said University; and, with the exception of the college chapels and libraries, they are the property of the University. Members of the University, as such, use the buildings and land, as hereinafter more specifically mentioned. Members of the University pay certain fees annually; some also at matriculation; before examinations; and on each graduation. The moneys so levied are now applied to the maintenance of the police, the keeping up of the public walks in and round the city of Oxford, the defence of property, the extinction of fire, the Bodleian Library (except as hereafter mentioned), and the payment of its officers.

The University and Colleges claim all the property above mentioned as not subject or liable to rates under any of the poor law statutes. The guardians of the poor of the parishes, on the other hand, contend that the University or Colleges occupy most of the buildings *and [*187 land, by their servants or their furniture or books, and all of them by their scholars and members; and that they are therefore occu-

piers of them, and rateable in respect of them under or by virtue of the stat. 43 Eliz. c. 2, and the other poor law statutes.

To enable the Court to judge whether the said University and colleges are rateable to the poor, or exempted from rates, in respect of the said several buildings, the following account of them is here given.

1. The Bodleian Library. The Library known under this title was first founded by Humphrey Duke of Gloucester, A. D. 1480. On that part of the present building, which is now the Divinity School, subsequently becoming very much decayed, it was restored and enlarged by Sir Thomas Bodley, Knight; from whom it derived its present name; and was reopened A. D. 1603. Very soon after this, the quadrangular part of the buildings known as "The Schools" was erected to the eastward of the original Library: and the present Library consists of certain rooms, all under one; and the same continuous roof being the upper stories of the Schools' quadrangle, with one room on the ground floor in the same quadrangle, and also the room over the Divinity School as aforesaid, and over the Convocation House, which is at the extreme west of the whole range; and all communicating internally. The Library contains many thousand volumes of books and manuscripts, with a few models and pictures; and the rooms are furnished with accommodation for readers. The Library is regulated according to certain statutes made from time to time by the University in convocation, the first of which statutes was promulgated and confirmed A. D. 1610, *188] after conferences thereon with Sir Thomas Bodley. By these *statutes, the management and control of the Library and its officers is vested in eight ex officio curators therein named. There are a librarian, two sub-librarians, and several assistants. The librarian is elected by the University in convocation. The sub-librarians and assistants are nominated by the librarian, subject, as to the sub-librarians, to confirmation by the curators and convocation, and as to the assistants, by the curators. Under certain regulations for order and the security of the books, all bachelors of arts and persons of superior degrees in the University have, by the present statutes, free access to the Library. Undergraduate members of the University and strangers are also admitted for the purposes of study, and without any payment. It is one of the libraries entitled by statute to receive a copy of every printed book which is entered at Stationers' Hall. There is a sufficient endowment for the repairs of the fabric of the Library. The books purchased, and the salaries of the librarians and other officers and servants, are paid out of the general funds of the Library, which arise in part from endowments of considerable value, and in part out of the fees imposed on all its members on matriculation, and annually afterwards; and also the fee on all degrees. The head librarian appoints a servant under the title of janitor, who attends by day in that part of the Library which is known as the picture gallery, and conducts strangers over it, and into the library; and from them he generally receives a gratuity; but it is entirely voluntary; and the attendant is the servant of the head librarian, and not the University, and is removable by the head librarian. But the head librarian is bound by statute to pay him the sum of 20*l.* per annum out of his own salary. He has nothing to *189] *do with persons who frequent the library for the purposes of study. He sells, within the building, catalogues, for his own

benefit, of the pictures in the gallery. The catalogue (copies of which he so sells) was compiled and printed at his own expense and risk. None of the librarians, or any servant or other person, sleeps in or occupies any part of the Library as a dwelling-house. The University derive no pecuniary profit from it. It has not hitherto been assessed to poor-rates.

2. The Divinity and other Schools. The Divinity School is the eldest of the existing buildings passing under the name of "The Schools." It was built on ground purchased by the University A. D. 1426. The other Schools were built about the year 1613, and comprise the ground-floor (except one room taken, as has been said, into the Bodleian Library) of three sides of the Schools' quadrangle; the Divinity School, being somewhat separated from the other Schools by an open passage room, forming, with the part of the Bodleian Library over it, the west end of the quadrangle. In these Schools the regular public examinations of members of the University, previous to the B. A. degree, are now conducted; and in some of them, such as the Divinity and Music Schools, exercises are performed by candidates for degrees. The Schools are supplied with tables, seats, and all necessary conveniences for the examinations: and the Divinity School is fitted with fixed rostrums and benches. The fabric of the Schools is supported by benefactions granted by Queen Mary. The University derive no pecuniary profit for the use of any of the Schools; but all candidates for examination are required, some time previously to such examination, to enter their names with one of the proctors (this is not done in the *Schools); [*190 and certain fees are at the same time paid to him by the candidates; which fees go toward the stipends of the examiners, any deficiency being made up by the University. The University also pay a servant under the title of "clerk of the Schools," who keeps the keys, and has charge of the Schools. He allows another person to have the keys of the Schools and to show the rooms; and this person receives a gratuity from most visitors, which is quite voluntary. The University also pay all other expenses connected with the Schools, including the supply of tables, benches, and chairs. As in the case of the Library, no servant or other person sleeps in or occupies any part of the Schools as a dwelling-house; nor are they in any way used as a residence. They have not hitherto been assessed to the poor-rates.

3. The Convocation House. This is divided into two parts, comprising an outer and an inner room, but under one roof, and communicating internally, one with the other. The inner room is used for the purpose of conferring degrees; on which occasion the usual fees are paid on admission; all of which go to the University. In this room is also transacted the other business of the University, which is brought before Convocation. The outer room is called the Apodyterium. In it the fees above mentioned are paid; and it is used as the University Court for the recovery of debts and demands; in respect of which also fees are payable to the two proctors of the Court, who alone are allowed to practise there, as the professional assistants of the parties, and one of whose special qualifications for the office is membership of the University. The internal arrangements of this outer room, the Apodyterium, are similar to other Courts of law, the same being furnished with forms

*191] or benches *and tables, and a throne for the Vice-Chancellor and his assessor. No part of this building is used as a residence. The building has not hitherto been assessed to poor-rates.

4. The Old Convocation House and Law School. This is a very ancient building, consisting of two rooms, the one over the other, and situate on the north side of the present chancel of the church of Saint Mary the Virgin, from which it is separated by a narrow open court. The building abuts northward on the church-yard, southward on the court aforesaid, eastward on Cat Street, and westward on the tower of the church, into which there was formerly an opening by a lofty arch, but which has for many years been closed. There is a separate external access to the building, at the west end of the north side, through the church-yard, and also to the lower room by a doorway at the east end in Cat Street. The building is recorded to have been formerly the chancel of Saint Mary's Church, previous to the erection of the present chancel. It was used by the University as a Convocation House, until the present Convocation House was erected. Since that time, it has been little used. In the lower room the University fire engine has been kept for many years. The upper room is fitted up with benches and a chair for the professor. It has been used for the delivery of lectures in law by the University professors. It is now also used as a lecture-room by the professor of Latin. Every one who attends these lectures pays to the professor a fee of 1*l*. for each course. No rent is charged by the University for the use of any part of the building; and they derive no pecuniary profit from it. It has not hitherto been assessed to the poor-rates.

*192] *5. The Sheldonian Theatre. This building was erected as a place of meeting for the University on occasions of greater state and solemnity. Afterwards the upper part of it, over the principal room, was used as the printing-office of the University, and so continued until about the year 1717: but no such use of it has been made since that time. It is used but seldom now, chiefly for the meeting of Convocation on the occasion of the annual commemoration; when a public oration is delivered, and prize essays and poems are read and recited. Occasionally, also, it is used at other times, when the attendance of members of Convocation is too large for their accommodation in the ordinary Convocation House. Concerts are sometimes allowed to be given in it, by express permission of the curators, at the time of the annual commemoration, and once at another time: and, for admission to such concerts, tickets are publicly sold; but no profit has ever accrued, or by the arrangements could have accrued, to the University from such concerts. Graduates in music have occasionally been permitted to perform their exercises here instead of in the statutable place in the Music School, when they have chosen, at their own cost, to employ a larger number of performers than the statute requires. In respect of musical degrees, fees are paid to the University. The degree is not conferred in the Theatre, but in the Convocation House. No pecuniary profits of any kind are derived by the University from the use of the room on any occasion whatever. Under the Theatre is a large room or cellar, which was formerly used as a place of deposit for the books of the University, which were printed at the adjoining Clarendon Press: but, after the erection of the new University Press, about thirty years since, the

*books printed there have not been brought down to the Theatre; so that now it is occupied by only some of the old stock of books [*193 printed at the former or Clarendon Press, and by volumes belonging to an eminent Oxford publisher, who has charge of the books of the University, and has used the cellar as a place of deposit for some of his own books also, but without paying any rent for it. In this building there is no movable furniture, but forms, two chairs, and pictures. It contains, beside the pictures, an organ. All these effects are the property of the University. A servant has of late years been appointed and paid by the curators, at an annual salary, to attend to the Theatre during certain hours of the day for the convenience of strangers desiring to see it; from whom, it is understood, he occasionally receives a gratuity; but such gratuity is entirely voluntary. The building is not used as a place of residence; and it has not hitherto been assessed to poor-rates. It is entirely supported by estates given for the purpose by the founder.

6. The Ashmolean Museum. This building consists of two parts, one part, comprising the basement story, contains a laboratory and other rooms; which have been fitted up as a residence, and are now occupied by the reader in mineralogy: and, in respect of this part, the occupier for the time being has for some years past paid poor-rates to the parish of Saint Michael. All the upper part of the building is used as a museum, and place of deposit of antiquities. Except that the whole building is enclosed within one outer stone wall and iron railing, the Museum is entirely separate from the basement story occupied by the reader in mineralogy: and it is entered *by a separate outside [*194 door, there being no internal communication; but the outside gate in the fence against the street is common to both parts of the building. The Museum is under the management of a keeper appointed by certain official persons of the University; and he appoints an attendant to be daily there. Members of the University are admitted to the Museum without payment. Other visitors do occasionally give the attendant a small gratuity. And the following notice is posted up conspicuously near the entrance. "Ashmolean Museum. The Museum is open from 11 o'clock until 4. Free admission to members of the University, and strangers introduced by them. A fee of 6d. each is required from all other persons visiting the Museum." But this fee is strictly a gratuity to the attendant, and no pecuniary profit to the University. The rooms of the Museum are also used during term time (by permission of the keeper) as an occasional place of meeting of the members of a literary society, not limited to members of the University, called "The Ashmolean Society," which is supported by annual subscriptions. Lectures, other than gratuitous, are not delivered in the Museum. And the keeper is paid an annual stipend, partly out of funds which the University holds in trust for that purpose, and partly out of the University's own funds. The University receives no rent, nor derives any pecuniary profit whatever from any part of the building, it being used for the deposit of specimens of natural history, curiosities, and antiquities. The attendant is commonly at the Museum from 11 till 4, the whole period during which admission is granted: but no one sleeps within the walls. The Museum has not hitherto been assessed to poor-rates.

*7. The Clarendon Buildings. These stand on ground partly in the parish of Saint Mary Magdalen, and partly in the parish [*195

of Saint Mary the Virgin. It is partly the freehold property of the University, and partly the property of the city of Oxford, and held by the University by lease from the Corporation for forty years. Here the printing business of the University was carried on for a great number of years, until the new University press was erected, about thirty years ago. Since that time the buildings have been used for various University purposes. In the basement story are the University police rooms, including a dwelling for a superintendent and a cell for prisoners. Above are four rooms; in one of which the meetings of the Hebdomadal Council are held; and another is subsidiary to it. In another room the magisterial business of the University is conducted. And the fourth is used by the Registrar of the University. The rooms in the upper story are used as lecture-rooms by various University professors, some of whom receive fees from persons who attend their lectures: but these fees form part of the emoluments of the professorships, and do not go to the University. Among the rooms is one devoted to Geological specimens; and admittance to view them is permitted by the reader in mineralogy and geology, on payment of 6d. The following is a copy of the notice posted up outside the room. "Museum of Mineralogy and Geology. Free admission for members of the University, and persons introduced by them, on Mondays, Wednesdays, and Fridays, from 1 to 4 o'clock. A fee of 6d. each is required of all other persons visiting this Museum, or not so introduced." But this fee is strictly a gratuity to the attendant, and no pecuniary advantage to the University *196] or to the *readers in mineralogy or geology. The readers before mentioned are appointed by the Vice-Chancellor of the University. The attendant is appointed by them. These buildings were assessed to the poor-rates of the parishes of Saint Mary Magdalen and Saint Mary the Virgin, whilst the printing business was carried on there; and so they have continued to be charged ever since. The fabric of these buildings is supported out of the general funds of the University. Each of these rooms contains appropriate furniture and fittings.

8. The Botanic Garden. This was first founded by the Earl of Danby, A. D. 1672. And the original garden was and is still enclosed by a stone wall. It is held by the University by lease under the President and Scholars of Saint Mary Magdalen College. The garden is entirely devoted to the cultivation of choice trees and medicinal and other plants for the promotion of the science of Botany, and is under the management of a professor of Botany. The professorship is in the gift of the college of Physicians. The present professor, a few years ago, raised funds by contributions from the University and individuals for various improvements in the gardens. And, amongst these improvements, he erected, in connection with the lecture-room and library already existing on part of the northern boundary of the garden, a house of residence for the professor, who before had no official house: and in this house he has since resided. He also added, at the same time, a lodge at the entrance, in which the porter lives. Before that time there was no house of residence whatever within the original garden. But outside the garden, on the south side, on a piece of ground with which a communication has of late years been made through the *wall, there *197] was, and still is, a small house which is occupied by the head

gardener. Upon the house for the professor and the lodge being erected, the house and lodge were charged to the poor-rates by the parish of Saint Peter in the East, within which it is situate. No part of the garden is in the separate occupation of the professor; and no fruit or vegetables are grown in the garden for the purpose of use or sale (except that a small plot of ground outside the wall of, but belonging to, the Botanic Garden itself, and held of Magdalen College, is appropriated to the use of the head gardener). And, instead of yielding any pecuniary profit, it is of necessity very expensive to keep up. There are separate endowments for the professor and for the gardener. The income for the garden arises from the rents of an estate; an annual payment out of the funds of the University; and the present professor has in fact also expended upon it a great part of the proceeds of this professorship. The professor delivers lectures in a lecture-room in his house, for which he receives a fee of 1*l.*, for a course, from each person who attends them. The public, whether members of the University or not, are admitted to the gardens and to the collections of books and herbarium free from charge, but not to the conservatories and store-houses, where an entrance fee of 1*s.* is charged and received: but this is entirely the benefit of the gardener, and not of the University or the professor. The professor, the gardener, and the porter, sleep on the premises. The whole of the garden is under cultivation for scientific and educational purposes. It is not in fact supported by annual contributions (except the payment from the University before referred to): and no laws, rules, or regulations, for the *management of it or [*198 any society associated with it, have been submitted to the bar-rister for the time being appointed to certify the rules of friendly societies, and filed with the clerk of the peace; nor any certificate granted, in respect thereof, according to the provisions of stat. 6 & 7 Vict. c. 36. The professor's house and the Botanic Garden have been separately rated to the poor of the parish of Saint Peter in the East, and paid rates from the year 1845 to July, 1854. No rate has been levied by the parish since that time, in consequence of the passing of the new Act.

9. The Taylor Institution. This is a building erected a few years since by the University on property purchased by them in the parish of Saint Mary Magdalen, out of moneys bequeathed to them by Sir Robert Taylor. The purpose of the institution is thus expressed by the testator in his will: "whereby he gives his money to the Chancellor and Scholars of the University of Oxford, and their successors, for the purpose of applying the interest and produce thereof in purchase of freehold land within, or, if possible to be made, within the jurisdiction of, the said University, for the erecting a proper edifice thereon, and for establishing a foundation for the teaching and improving the European languages in such manner as should from time to time be approved by the said Chancellor and Scholars in Convocation." The building contains a library, several lecture-rooms, apartments in which a librarian resides, and a lodge where a porter resides. By regulations agreed by the University in Convocation, nine curators are appointed, with powers to nominate a professor, teachers, librarian, and porter; the nomination of professor and teachers being subject to confirmation by Convocation. The lecturing and *teaching is during term time gratuitous, and open to all members of the University. The teachers are allowed [*199

to teach in private, but not within the Taylor building. The librarian, who is not a member of the University, with his wife and servants, reside within the building, and no other person. The librarian and porter, as well as the professor and teachers, are all paid; and the whole expense of the institution is defrayed out of the funds provided by Sir Robert Taylor, but now belonging to the University itself. The University derive no pecuniary profit from the institution. The contents of the building are chiefly furniture and books.

10. The University Galleries. These were built on ground in the parish of Saint Mary Magdalen, purchased by the University at the same time with that on which the Taylor Institution has been erected, and immediately adjoin and communicate with that Institution, and form a part and parcel thereof externally, but not internally. They were built out of funds provided partly by a bequest for the purpose, but almost entirely by the University. They are appropriated to the reception of, safe custody of, and in fact contain, paintings, sculpture, and other works of art. By regulations passed in Convocation, the galleries are placed under the management and superintendence of three curators, resident in the University, who are empowered to make rules, from time to time, for the opening and closing of the galleries, and for the admission of visitors, and to appoint a keeper and any assistants. The keeper and his domestic servant occupy apartments in the building; but there are no other persons resident in it. The keeper receives a *200] salary from the University. No lectures are delivered *there; nor is pecuniary profit of any sort derived from it. Catalogues of the contents of the building have been printed for the convenience of the public, and are sold within the building. If the keeper sells any, the sale is entirely for his own benefit only. The University derives no direct benefit whatever from them.

11. The College Chapels. These are situate within the walls, and respectively form part and parcel of the college to which they belong. They are all consecrated buildings, in which the sacraments and other public offices of the Church are celebrated, and are places for public religious worship specified in the Acts of Uniformity. Practically, the congregations consist, for most part or wholly, of members of the respective colleges. The chapels are only accessible through the outer gates of the colleges. Members of the college are expected to attend chapel; and the attendance there forms a part of their regular duties.

12. The College Libraries. These are buildings within the walls of the respective colleges, containing books and manuscripts. They yield no pecuniary profit. They are maintained in some cases by endowments, in some by fees, in some by grants from the colleges, and some from more than one of these sources.

The case was argued in last Term.(a)

Pashley, in support of the rate, contended that the buildings and land were in no instance so used for exclusively public purposes as not to be the subjects of beneficial occupation, and that all were in fact so *201] *occupied, and applied for purposes essential to the occupation, though those purposes were more or less academical; that pecuniary profit was not essential to rateability; and, further, that stat. 6

(a) May 27th, 1857. Before Lord Campbell, C. J., Coleridge and Erle, Js. Crompton, J., was present during the early part of the argument.

& 7 Vict. c. 36, was inapplicable; but that the passing of that Act showed that occupation for literary purposes was generally liable to rate. He referred to *Regina v. Baptist Missionary Society*, 10 Q. B. 834 (E. C. L. R. vol. 59); *Regina v. Temple*, 2 E. & B. 160 (E. C. L. R. vol. 75); stat. 5 $\frac{1}{2}$ G. 3, c. 156, s. 2; stat. 6 & 7 W. 4, c. 110; stat. 17 & 18 Vict. c. 81, s. 45; *Regina v. Cockburn*, 16 Q. B. 480 (E. C. L. R. vol. 71); Kennett's *Parochial Antiquities*, vol. 2, p. 282 (ed. Oxford, 1818), and the Glossary, ib. v. *Capellanus baronis*; stat. 1 Eliz. c. 2, s. 4; stat. 13 & 14 C. 2, c. 4, s. 18.

Keating, contra, argued that the occupation was only for purposes that were public, educational, charitable, or religious, at any rate not beneficial to an occupier. He referred to *Regina v. St. George, Southwark*, 10 Q. B. 852 (E. C. L. R. vol. 59); *Regina v. Shee*, 4 Q. B. 2 (E. C. L. R. vol. 45); *Rex v. Waldo*, Cald. 358; *Regina v. Wilson*, 12 A. & E. 94 (E. C. L. R. vol. 40); *Rex v. Woodward*, 5 T. R. 79.

Pashley, in reply, referred to *Rex v. Gardner*, 1 Cowp. 79; *Mayor of Liverpool v. Overseers of West Derby*, 6 E. & B. 704 (E. C. L. R. vol. 88); *Governors of the Bristol Poor v. Wait*, 5 A. & E. 1 (E. C. L. R. vol. 31); *Regina v. Wallingford Union*, 10 A. & E. 259 (E. C. L. R. vol. 37); *Regina v. Justices of Hull*, 4 E. & B. 29 (E. C. L. R. vol. 82); *Purchas v. Churchwardens of The Holy Sepulchre*, 4 E. & B. 156 (E. C. L. R. vol. 82).

Cur. adv. vult.

*COLERIDGE, J., now delivered the judgment of the Court.

This is a special case stated for our opinion, under an Act [*202 which passed in the 17th & 18th Victoria, substantially to regulate the poor-rate to be raised within the City and University of Oxford: and we are to determine on the claim which the University makes to exemption from rateability in respect of several of its buildings, and some land alleged to be in its occupation; and also on a similar claim which the colleges therein make, or which is made for them, in respect of their chapels and libraries.

No question appears to be made, either by the University or the Colleges, respectively, as to the bare occupation of the premises in regard to which the dispute exists, nor that they are of a nature to be capable of an occupation which would, under ordinary circumstances, make the occupant liable to be rated in respect of them. This Court has, on several occasions, expressed an opinion that it might have been wiser originally to have decided questions of rateability on these grounds only, and not to have entered on the embarrassing questions which have constantly arisen, and must still arise, upon the nature of the occupation, whether it be, and in what sense, beneficial or not to the occupier. It would be out of place to repeat now the arguments, obvious enough, in support of that opinion; for the course of decisions is of such long standing, so uniform, and acted upon in so many instances, that it would be quite wrong in us, and might lead to great injustice in particular cases, if we were to depart from them. We are bound, therefore, to inquire, as to each of the buildings and other premises in respect of which the rate is here *sought to be imposed, whether the occupation of the University or the Colleges appears to be beneficial in [*203 the sense which is required for rateability.

It may be convenient, however, to premise a few general remarks, which may make the principles of the inquiry clear; and this without

specific reference to the decided cases. It is obvious, in the first place, that, although the legal character of the occupant may be material to show the nature of the occupation, it is by no means conclusive. A body corporate may so occupy as to be rateable; an individual may so occupy as not to be rateable; for the corporation may have what, in respect of itself, may be called individual interests, and the occupation may be referable to them; and the individual may be clothed with a public character, and be charged with public interests, as to which he has no more personal interest than any other subject of the realm; and the occupation may be solely in respect of these. In the former case, it is clear that the corporation would be rateable; in the latter, that the individual would not. And what is thus true of different corporations and individuals may be true of the same corporation, or same individual, in respect of different occupations: the question in each case, of course and obviously, depending on the character of the occupation of the premises in respect of which the particular rate is sought to be imposed. This has often been exemplified in the case of a public functionary, or military officer. If he occupy an office for the discharge of his duties, or, supposing some residence for him be necessary for the discharge of those duties, if he occupy only such a residence as is necessary for that purpose, he is not rateable; if it goes beyond this, for such excess as *204] must then be *referable to the individual, and to his private interests and enjoyments, he is rateable. And this points to the principle on which the questions in this case are to be answered. That principle we take to be this: that the public is not assessable to the poor-rate; and therefore the occupier, whether corporation or person who in his occupation merely and only represents the public or occupies for the public, stands on the same footing; for it is only by so holding this that effect can in the greater number of cases be given to the principle. We have pointed out that the occupation may be in both characters, public and private, and so make the occupier rateable as to part and leave him exempt as to part: and the application of the principle may therefore sometimes be difficult; and it may often fail of mathematical precision in its application: but the principle is an intelligible one; and, with regard to it, we believe there is no uncertainty or inconsistency in the decided cases.

Starting from this principle, the University of Oxford, without attempting an exact or complete definition of it, may at least be said to be a national institution created for a great national purpose, the advancement, namely, of religion and learning through the nation. We are bound judicially so to regard it; for the Legislature, in public Acts of Parliament, so deals with its title and property, its discipline and government, as to declare that it holds the one and must be compelled, if necessary, to regulate the other, not merely with a view to any private interests of the corporation or corporators, but so as best to advance the interests of the public in the two respects we have named, of learning and religion.

*205] This, then, being the general character of the *occupier, we are to inquire whether, as to each of the properties now in question, it occupies solely for these public purposes for which it was created, or for any subordinate and quasi private purpose.

Of these the first is the Bodleian Library. Of the character of this

there can be no doubt. A great storehouse of all that is valuable and curious in literature may be considered almost an indispensable appendage to such an institution for the advancement of religion and learning nationally, as Oxford undoubtedly is. If this be questioned, let it be considered what such an University would be without it; or let it be answered, whether, in the idea which any competent person would a priori form of a perfect University, such a library would not be included, not merely as an ornament, but as an essential. It is, in truth, in the nature of a *causa causans*: it tends to form that literature and accomplish those teachers, in the higher degree, from which and from whom learning is to flow down to the scholars who come to the University to be taught. Presumptively, then, the occupation by the University is public. Then, is it shown that anything private is mixed up with what is public? We can see no trace of this in the following circumstances: that access to it is under regulations, and not open without restraint to all Englishmen; that, by statute, a copy of every book entered at Stationers' Hall may be required for it by the curators; that it has an endowment for its repairs and for the purchase of books; that to this latter object the members of the University contribute by fees at matriculation and on other occasions; that a voluntary gratuity is made to the janitor by visitors. Such circumstances as these do not touch the character of the occupation by the *University, but are all consistent with and in aid of the public purposes for which alone it [*206 is held. We are of opinion, therefore, that no rate can be imposed in respect of this.

The same presumption naturally arises as to the occupation of the Divinity and other Schools. One of the public functions of the University is to test by examination the proficiency of its students in what it has taught them. This teaching embraces more than the trivium and quadrivium of the mediæval schools: for these examinations, therefore, many various rooms must be provided; and these must be plainly and suitably furnished, so as to receive, not merely the examiners and the candidates, but also those who are in statu pupillari, who are properly invited to attend and improve themselves by hearing the *viva voce* examinations or disputations. Some accommodation, also, is proper for strangers and others, whose presence is a stimulus, and, in some sort, a reward to the ability, and learning and industry which these examinations often display. No excess of any kind is stated; and the stipends to the examiners, the salary to the clerk of the schools, the gratuities by strangers visiting, some of which particulars flow from and none to the University, have no bearing on the question to be determined. Here again it might be asked: is the definition of a University complete, if you do not ascribe to it the power of conferring degrees? Is it not in the discharge of a public duty that it confers them? And can it justly or reasonably confer them without previous examination? No rate can be imposed in respect of these.

It is needless, surely, to say anything respecting the Convocation House. Its purposes are familiarly known. *But a point was made in respect of its outer room, the apodyterium, because there [*207 usually the persons on whom degrees have been conferred pay their fees: and it is used as the place of sitting of the Vice-Chancellor's Court. The fees are paid to the University: but it is not stated that these are

paid for or applied to any but its public purposes. It cannot be presumed that the University sells its degrees for profit; as that would be a violation of its duty. If then the payment of the fees does not affect the Convocation House in which the degrees are conferred, it cannot affect the apodyterium in which the fees are paid. Nothing can arise from its being used as a Court of Justice. No rate therefore is impossible in respect of this building.

The Old Convocation House and Law School fall within the same rule, even as to their present use; which, as to one part, the University allows gratuitously to the law professors and the professor of Latin. These professors, indeed, receive fees; but these fees have no reference to this occupation: they, indeed, do not occupy; and they would receive their fees equally, wherever they lectured. They are in truth but officers of the University, employed by her in carrying out some of her public purposes. The other part is used at present for keeping the University fire-engine. Such an implement it is proper for her to have for the preservation of her public buildings; and it is strictly subservient to her public purposes.

The Sheldonian Theatre, in respect of the ordinary use of it, will clearly not make the University rateable. It does not come within the necessities of such an institution so clearly perhaps as the public schools.

*208] A University might carry out ordinarily its general *purposes without such a building: but necessities in this case are as much comparative as in regard of a minor, where the question is on a replication of necessities. Consideration must be had of the circumstances, the dignity, magnitude, and great importance of the Institution. The specific purposes to which the Theatre is applied are a fitting complement of the main purposes of the University, and have nothing private in them whatever. If, indeed, it were commonly used as a concert-room, to which admission was open for the public on payment, we should not have thought the occupation the less rateable because the University did not receive the payment, but suffered others to use the room and receive it. But this use is so merely occasional and exceptional, that it would be unreasonable to consider it as affecting the general character of the occupation, any more than, as was observed in the argument, the triennial concerts in certain of our cathedrals can alter the general character of their occupation by the deans and chapters. But the case of the cellar, at present, seems different: it is not used for any public purpose; and, as we understand the statement, it is now, not merely occasionally, but regularly, occupied by an individual for his own benefit. That no rent or other consideration is paid by him to the University is immaterial. To this extent, and so long as this use of the cellar is permitted, we think the University rateable.

The only question made as to the Ashmolean Museum is as to the upper part of the building. The lower part is rated, and, we think, properly; for it is fitted up and used as a residence by the reader in Mineralogy; and nothing is stated to show that the residence is a necessary appendage to the office for the discharge of its *duties. We

*209] see nothing stated as to the upper part, which is properly the Museum, from which we infer a liability to the rate.

We have come to the same conclusion as to the Clarendon Buildings. Police-rooms, and cells for prisoners, appear to fall within the same

principle as courts and prisons: and a residence for a superintendent, not stated to be in excess of what is suitable for the discharge of his duties, within the same as a jailor's apartments in a jail; for it is as necessary that the superintendent should reside in the establishment as that a jailor should in a jail. Of the few rooms above, a question has been made as to the two in which the magisterial business of the University is conducted. But, inasmuch as for good reasons the University authorities have been intrusted with the civil magistracy of the academical portion of the city, and this, as we take it, not merely for municipal objects, but as subservient to the primary purposes of the institution, and to make it more efficient for the advancement of education, we think these also fall within the general grounds of exemption. No question can be made as to the rooms in the upper story.

The Botanic Garden. We think the residences of the professor, the porter, and the head gardener, as well as the land appropriated to the use of this last, all properly rateable: but, on the principles laid down by us, and applied to the facts stated in the case, we think the garden itself is not. The ancient designation of a University was *Studium Generale*, or School of Universal Learning; and there can be no doubt that botany is one of the branches which cannot be excluded from cultivation there. But the peculiar nature of the science requires not merely books or preparations, but a living garden, *for its proper study: [*210 a garden, such as the case describes, is in fact a botanical library; and the case here expressly finds that "no fruit or vegetables are grown in the garden for the purpose of use or sale;" that "it is *entirely* devoted to the cultivation of choice trees and medicinal and other plants for the promotion of the science of botany;" and that "the *whole* of the garden is under cultivation for scientific and educational purposes." All these statements would certainly not exempt land in the hands of an individual, who chose to devote it to such purposes instead of making it profitable pecuniarily. In that case his intellectual gratification would be his rent. But the distinction turns on the public purposes for which the whole institution exists; and that this is but one instrument for the fulfilling of those purposes.

The Taylor Institution. For the general body of these premises, we see no ground to make the University rateable. In respect of the Librarian's residence, it is not stated to be necessary for him to reside in the building: if it be not, the whole residence must be considered as occupied for his own convenience; and he would be rateable for the whole. If it be necessary that he should reside in the building, then he would be rateable for such excess of accommodation, if any, as would be referable, not to his public duty, but his private convenience. But these alternatives, as we have already intimated, must be considered liberally, with reference to the circumstances: what would be excess in regard to the porter may be no more than strictly necessary for the librarian.

The University Galleries. We see nothing in the occupation of these to make the University rateable for it.

*We have had some difficulty in deciding the question raised [*211 respecting College Chapels and College Libraries, especially the former. Both are unquestionably subservient to the same purposes as those for which the University exists: but they are not instruments in the hands of the University, but of their respective Colleges; and,

although, in return for its aggregation to the University, the College gives up some portion of its independence, and to a certain extent puts itself under the government and submits in some particulars to the interference of the University, yet it does not wholly lose its private character; nor is it merged in the University. The two may exist in theory, independently of each other; although, in England at least, we have been accustomed to think each essential to the perfect working of the other. The domestic discipline and paternal rule of the College, its maintenance of order, its closer inspection and catechetical instruction by tutors, being the corrective, it is thought, of the greater liberty of the University, its excitements and conflicts, with the perhaps too general and superficial teaching by professors. Still the Colleges, so considered, want that ground for exemption which we think the University possesses; neither have they ever been held exempt generally as such. Then, although the chapel be consecrated and for ever set apart from all secular purposes, and so in one sense rendered incapable of producing profit to the occupier, it is no more exempt in the hands of the College than a chapel in a private person's house which he has succeeded in persuading the Bishop to consecrate, or than a proprietary chapel, which might be consecrated, and would not therefore become exempt from poor-rate if the occupation of it remained as before in the *212] ordinary *sense beneficial to the trustees, or lessee, or other occupier. The consecration, indeed, is wholly and entirely diverse intuitu, and has no essential bearing on the question of rateability. We come, on the whole, to the conclusion that the Chapels, as well as the Library, are occupied so as to make the Colleges rateable.

This exhausts the questions we have been desired to answer: and the rate will be modelled accordingly.

HOWELL, Clerk to the Vestry of the Parish of ST. GEORGE IN THE EAST in the County of MIDDLESEX, and to the Trustees for putting in execution the Act of Parliament of 46 G. 3, c. lxxvii. (local and personal, public), v. The LONDON Dock Company. *July 4.*

Under The Metropolitan Local Management Act, 18 & 19 Vict. c. 120, s. 159, where it appears to a parish vestry that part of the expenses, for defraying which a sum is ordered to be levied, is incurred for the special benefit of any particular part of the parish, or not for the equal benefit of the whole parish, the vestry may direct the expenses to be levied in part, or exempt a part, of the parish accordingly. By sect. 161 the general rates are to be levied in respect of property rateable to the poor.

Docks had been, before the Act, assessed at a certain value for paving-rate, under former Acts, which directed that the paving-rate should be laid on occupiers of premises in the streets paved, or adjoining to or opening into the same. After this Act, a general law, including paving-rate, was laid on, in which the value, in respect of the docks, was assessed upon the whole dock property indiscriminately, so as much to exceed the former valuation; and the vestry expressly resolved that the owners were not entitled to any exemption: but a case was stated, in which it was agreed that this Court should act as on a case stated on appeal to Quarter Sessions.

The Court laid down that the rate ought to be amended, so far as it appeared that there were distinct parts of the dock property deriving no benefit from the paving, or a less direct benefit than other parts of the parish. As, for instance, in respect of the area of the basin covered by water and used only by ships, and of bonding warehouses on the dock quays, where goods were unshipped and warehoused, and afterwards exported, without inland transit.

THIS was an action of debt, brought by the plaintiff, in the above character, to recover 3063*l.* 1*s.* 8*d.*, *being the amount of a rate [**213* made on the property of defendants on 20th February, 1856. By consent of parties, and order of Coleridge, J., under The Common Law Procedure Act, 1852, the following case was stated for the opinion of the Court, without pleadings: it being agreed that the case was to be dealt as if granted by the Quarter Sessions on appeal against the rate.

An Act of Parliament was passed, &c. (46 G. 3, c. lxxvii., “For more effectually maintaining, regulating, and employing the poor within the parish of Saint George, in the county of Middlesex, and for cleansing and lighting the squares, streets, and other passages and places, and for keeping and regulating a nightly watch within such parts of the said parish as are not within the Liberty of the tower of London.”) By sect. 2 of the above Act, fourteen vestrymen were to be annually nominated, who, together with the rector, churchwardens, and overseers of the poor for the time being, were to be the trustees for putting the Act in execution for the space of one year. Trustees have been annually appointed under this Act down to the present time. Sects. 13 and 14 of the above Act are as follow.

13. “And be it further enacted that the said trustees shall, four times in every year, meet together; and they, the said trustees, or the major part of them, so assembled, shall then settle and ascertain the respective sums of money necessary to be raised by an equal and indifferent pound rate for the relief, maintenance, lodging, and employment of the poor of the said parish, and for cleansing and lighting the squares, streets, lanes, alleys, courts, yards, and open passages, ways, and places, and regulating and keeping a nightly watch in such part of the said parish as is not within the said liberty of the *tower of London, as to [**214* the said trustees or the major part of them, so assembled, shall seem reasonable and sufficient to answer the purposes aforesaid, and of this Act.”

14. “And be it further enacted, that” “the said rector, churchwardens, overseers of the poor, and trustees, qualified as aforesaid, or any seven or more of them, so assembled, shall, and they are hereby required to, make and sign two distinct rates or assessments, not exceeding the amount of the respective sums so settled and ascertained: one of which rates shall be laid upon all and every person and persons who do and shall inhabit, hold, or occupy any land, house, shop, warehouse, or other building, tenement, or hereditament, within the said parish, for the relief of the poor of the said parish; and the other of the said rates or assessments upon all and every person and persons who do and shall inhabit, hold, or occupy any land, house, shop, warehouse, or other building, tenement, or hereditament, other than and except any docks or warehouses which are or may be considered exempt from such rates, or some part thereof, for a limited time under any Act or Acts relating to The London Docks, within such part of the said parish as is not within the liberty of the Tower of London, for cleansing and lighting the squares, streets, lanes, alleys, courts, yards, and other open passages, ways, and places, and regulating a nightly watch within such parts of the said parish as are not within the said Liberty: which respective rates shall be laid according to the annual rent or value of all such messuages, shops, warehouses, lands, tenements, and hereditaments respectively.”

*215] Sect. 19 of the Act gives a summary means of *recovering the rate before justices of the peace. And, by sect. 23, on "default in payment after fourteen days' notice left on the premises, the rates may be recovered by action in the superior Courts, in the name of the vestry clerk for the time being."

Under this statute, the poor-rates of the above parish have been made down to the present time: and the London Dock Company have been rated to the said poor-rates on the property hereinafter mentioned to have been comprised in the rate now in dispute, and upon the same rateable value, and have, previously to the making of the rate now in dispute, paid such rates.

By local Acts, &c. (17 G. 3, c. 22, and 22 G. 3, c. 86), provisions were made for paving parts of the said parish, and for dividing the same into districts for that purpose: and powers were given to the Commissioners, appointed under the said Acts, to make rates for defraying the expenses of paving and repairing, and other the purposes of the last-mentioned Acts, upon all persons occupying premises situate within the streets, lanes, and places respectively which were paved by such Commissioners, respectively, or adjoining to or opening into the same.

The powers of such Commissioners were altered and extended by the Act, &c. (57 G. 3, c. xxix.), local and personal, public, "for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein." (a)

Sect. 24 of this Act is as follows.

"And be it further enacted, that it may be lawful to and for the persons, who under any local Act or Acts of *Parliament for any
*216] parochial or other district within the jurisdiction of this Act" (which includes the said parish of Saint George in the county of Middlesex), "are empowered to make rates and assessments for the expenses of paving or keeping in repair the pavements of any streets or public places within such parochial or other districts, either separately or jointly with other purposes, from time to time and at all times after the passing of this Act, for and notwithstanding any provisions or restrictions, matters or things, in such local Act or Acts of Parliament contained, to make and sign all and every or any such rates or assessments as shall be from time to time necessary or expedient for paving or repairing the pavements of the streets and public places within such parochial or other district, pursuant to the direction of the local Act or Acts of Parliament for such parochial or other district, or of this Act; and for the payment of all debts or charges heretofore incurred or hereafter to be incurred in and about the execution of such local Act or Acts of Parliament and of this Act, or either of them, as to the paving and repairing the pavements of and in such parochial or other district; and for the payment of any interest or annuities charged or chargeable on the paving-rates of the said parochial or other district, or for the payment of any principal moneys which may be due in respect thereof, either separately or jointly for other purposes, as to such persons shall seem reasonable and proper, not exceeding in amount in any one year double the sum or sums in the pound limited and fixed in the local Act or Acts of Parliament for such parochial or other district as the rate or rates in the pound which may be made for and towards the charges of

(a) This Act is printed in the Statutes at Large.

paving and repairing the *pavements therein, and either separately or jointly with any other objects or purposes; except in [*217 such parochial or other districts wherein the sum or sums in the pound limited and fixed in the local Act or Acts of Parliament for each of such parochial or other districts, as such rate or rates in the pound, are at the time of the passing of this Act limited and fixed at a sum not exceeding one shilling in the pound, and in any such parochial or other district not exceeding in amount in any one year treble the sum or sums in the pound so limited and fixed; and that such rates or assessments may be either substituted for the rates or assessments directed by such local Act or Acts of Parliament to be made for or in respect of the paving and keeping in repair the pavements of such parochial or other district, either separately or exclusively or jointly with any other objects or purposes, or may be additional thereto, as the persons making the said rates or assessments from time to time at the making thereof may determine and direct; and that such rates and assessments, and also all rates or assessments made and signed from and after the passing of this Act, for and in respect of or towards the paving or repairing the pavements of the streets or public places in any parochial or other district, and either separately or jointly with or towards any other objects or purposes, by virtue of any local Act or Acts of Parliament, or by virtue of this Act, shall be laid upon all and every person or persons who do and shall inhabit, hold, occupy, be in possession of, or enjoy, any messuages, tenements, lands, grounds, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings or hereditaments, situate or being within any of the streets or places within the said parochial or other *district, and shall be just and equal pound-rates, and [*218 shall be laid according to the annual rents or value of such messuages, tenements, lands, grounds, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings and hereditaments respectively; and also that all rates or assessments hereafter made by virtue of this Act shall be made and signed and allowed and published by the same persons and in the same manner as hath been directed by the local Act or Acts of Parliament relating to each particular parochial or other district, as to the rates or assessments for such parochial or other district for and towards the expenses of paving and repairing the pavements therein, and either separately or jointly with any other objects or purposes, by such local Act or Acts of Parliament; and that all such rates or assessments, being so made and signed and allowed and published (when such signature, allowance, and publication shall be necessary), shall be good and effectual; and that all and every such rates and assessments to be made by virtue of this Act, or to be hereafter made by virtue of any local Act or Acts of Parliament, for any parochial or other district within the jurisdiction of this Act, shall become due and payable and may be received and recovered as soon as the same shall have been duly made and signed, published, and allowed, when such signature, publication, and allowance shall be necessary under any local Act or Acts of Parliament for any such parochial or other district; but that the same may be collected in one or several payments, or yearly, or half-yearly, or quarterly, as the Commissioners or trustees, or other persons having the control of the payments in the streets or public places of any such parochial or other district, shall

*219] from time to time think proper and *direct: Provided nevertheless, &c." (relating to inhabitants and occupiers of wharfs in Southwark).

The London Docks are situated partly in the said parish of Saint George in Middlesex, and partly in the parishes of Wapping and Shadwell, the greater portion being in the said parish of Saint George: and that portion of the Docks which is situate in the said parish of Saint George was, for the purpose of paving, comprised in two separate districts, and under the jurisdiction of separate Commissioners, appointed under the said Acts of 17 G. 3, c. 22, and 22 G. 3, c. 86, viz., The Saint George's and Wapping Pavement Commissioners: And, for that portion of their property which was included in the Saint George's paving district, The London Dock Company was, previously to and at the time of the passing of The Metropolis Local Management Act, rated in point of fact at the sum of 17,000*l.*, being the estimated annual value of their property immediately abutting on the streets, lanes, and passages so paved by the Saint George's pavement Commissioners. But it is not admitted by the plaintiff that such mode or amount of rating was right in point of law. They were also rated for other portions of their Docks and premises within the said parish of Saint George for paving purposes by the Wapping Commissioners, having jurisdiction in the streets and places upon which such Docks and property abutted, but to a much less amount, in the whole, than the rateable value of the same property as assessed to the poor-rates. But it is not admitted by the plaintiff that such mode or amount of rating was right in point of law.

By the Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. *220] 90, "all the duties, powers, and *authorities for or in relation to the paving, lighting, watering, cleansing, or improving of any parish, mentioned in schedule (A.) to this Act" (the said parish of Saint George in Middlesex being in such schedule), "or any part of such parish, now vested in any commissioners, or in any body other than the vestry of such parish, or in any officer of any commissioners or other body, and all other duties, powers, and authorities in anywise relating to the regulation, government, or concerns of any such parish or part, or of the inhabitants thereof" (except such as relate to the affairs of the church, or the management and relief of the poor), "now vested under any local Act of Parliament in any commissioners, or in any body other than the vestry of such parish, or in any such officer, shall cease to be so vested, and shall, save as herein otherwise provided, become vested in and be performed and exercised by the vestry of such parish under this Act;" "and the provisions of every such Act of Parliament as aforesaid shall be applicable to the vestry of every parish mentioned in the said schedule (A.);" and the officers of all commissioners and persons whose powers were determined by the said Act were to cease and determine.

By sect. 158 of the same Act "every vestry and district board shall from time to time, by order under their seal, require the overseers of their parish, or of the several parishes in their district, to levy, and to pay over to the treasurer of such vestry or board, or into any bank in such order mentioned, and within the time or times, thereby limited, the sums which such vestry or board may require for defraying the expenses of the execution of this Act;" "and every such vestry and

board shall distinguish in their orders sums required for *defray- [*221
ing expenses of constructing, altering, maintaining, and cleansing
the sewers, or otherwise connected with sewerage, and also, where the
Act" 3 & 4 W. 4, c. 90, "or any other Act by virtue whereof land is
rated in respect of expenses of lighting at a less amount in proportion
to the annual value thereof than houses, or is wholly exempted from
being rated in respect of such expenses, is in force in any parish, or any
part of any parish" (but which is not the case in this parish), "at the
time of the passing of this Act, distinguish, as regards such parish, or
part, the sums required for defraying expenses of lighting their parish
or district, from sums required for defraying other expenses of execut-
ing this Act."

Sect. 159 enacts that: "where it appears to any vestry or district
board that all or any part of the expenses, for defraying which any sum
is by such vestry or board ordered to be levied as aforesaid, have or has
been incurred for the special benefit of any particular part of their
parish or district, or otherwise have or has not been incurred for the
equal benefit of the whole of their parish or district, such vestry may,
by any such order, direct the sum or sums necessary for defraying such
expenses, or any part thereof, to be levied in such part, or exempt any
part of such parish or district from the levy, or require a less rate to be
levied thereon, as the circumstances of the case may require."

Sect. 92 provides "that all expenses of paving, lighting, watering,
cleansing, or improving any parish or any part of any parish mentioned
in schedules (A.)," &c., "to this Act, and all other expenses in relation
to the regulation, government, or public concerns of any such parish or
part, or of the inhabitants thereof," except as therein *men- [*222
tioned, "shall be deemed expenses incurred in the execution of
this Act, and shall be defrayed accordingly."

Sect. 161 enacts that "the overseers of the poor of every parish to
whom any such order as aforesaid is issued" (which term "overseers" in
this parish applies to the said trustees for putting in execution the said
Act of 46 G. 3, c. 77), "shall levy the amount mentioned therein accord-
ing to the exigency thereof, and shall for that purpose make separate
equal pound rates upon their parish, or the part thereof upon which any
sum specified in such order is required to be levied, in respect of each
sum thereby ordered to be levied; that is to say, a separate rate in
respect of each sum ordered to be levied for defraying expenses con-
nected with sewerage, to be called a sewers' rate; a separate rate in
respect of each sum ordered to be levied for defraying expenses of
lighting (where a separate sum is ordered to be levied for defraying such
expenses), to be called a lighting-rate; and a separate rate in respect
of each sum ordered to be levied for defraying other expenses of exe-
cuting this Act, to be called a general rate; and shall make such
respective rates of such amount in the pound on the annual value of the
property rateable, as will, in their judgment, having regard to all cir-
cumstances, be sufficient to raise the sum specified in such order; and
such rates shall be levied on the persons and in respect of the property
by law rateable to the relief of the poor in the respective parishes, and
shall be assessed upon the net annual value of such property ascertained
by the rate for the time being for the relief of the poor; and the said over-
seers shall, for the purpose of levying such rates, proceed in the same

manner, and have the same powers, remedies, and privileges, as for *223] levying money *for the relief of the poor; and all such rates shall be allowed in the same manner, and be subject to all the same provisions, in relation to appeal," &c., "as the rate for the relief of the poor in the same parish."

By sect. 247, "all Acts of Parliament in force in any parish or place to which this Act extends, or in any part of such parish or place, shall, so far as the same are inconsistent with the provisions of this Act, be repealed as regards such parish or place, or such part thereof, notwithstanding any provisions of this Act continuing and transferring respectively to vestries of parishes, and transferring to district boards any duties, powers, or authorities now vested in vestries, commissioners, or other bodies."

The vestry of the said parish of St. George, duly elected under the said Metropolis Management Act, proceeded, in pursuance thereof, to make, and duly made, an order upon the trustees for putting in execution the said Act of stat. 46 G. 3, c. lxxvii., hereinafter called trustees of the said parish (being the officers charged with making and levying the rates for the relief of the poor), to levy and raise a sum of 6000*l.* for the purpose of defraying the general expenses of execution of the said Act (exclusive of expenses relating to the construction of sewers). (The order, dated 17th January, 1856, was then set out.) The above order having been duly issued and served on the trustees of the said parish, they, in pursuance of such order, on 20th February, 1856, made a rate of 10*d.* in the pound upon the persons and property rateable to the relief of the poor in the said parish of St. George, upon the net annual value of the property in the parish, ascertained by the then last *224] made rate for the relief of the poor: which rate was duly *allowed and signed by one of the police magistrates of the metropolis, and published as by law required: and in which rate the Company were assessed as follows.

The case then set out the rate, in which the London Dock Company were assessed, as occupiers, in respect of warehouses, wharfs, docks, quays, &c., within the walls of The London Docks, and for other warehouses; and for a jetty, offices, and house. The assessment in all amounted to 73,514*l.*

The said Company were and are the owners and occupiers of the property mentioned in the above rate: and the same was and is situate in the parish of St. George, and rateable to the poor-rates of the parish at the sums mentioned in the rate. And the Company were assessed for the same property at the same amount in the last poor-rate for the said parish made previous to the said 20th of February, 1856.

The whole area of the Docks in the said parish is paved at the Company's own expense.

Out of the sum of 6000*l.*, mentioned in the said order of vestry of the 17th January, 1856, about half was estimated as required for paving purposes. Some of the principal approaches to the London Docks are by water; and a large part of the goods conveyed to and from the Docks are conveyed by water carriage. The principal land entrance to the Docks is in the parish of Wapping. One of the land entrances, and the principal water entrance to the Docks, are in the parish of Shadwell: but there are five land entrances to the Docks for wagons and carts and

other vehicles in the said parish of St. George; by some of which they have access to and from all parts of the London Docks within the said parish: and a great portion of the heavy traffic to and from the *Docks passes in and out of these entrances and through various streets in the said parish. [*225

The Dock Company, having been served with notice of the said general rate, and the same having been demanded of them, applied to the vestry of the said parish, that the vestry would be pleased to make an order that the said general rate should, as to 3000*l.*, part thereof, being the amount alleged by the Company to be applicable to paving purposes, be levied on such part of the said parish only as was not within the walls of The London Dock Company, and upon the warehouses and other premises of the Company previously assessed to the paving-rate by the said Commissioners for the St. George and Wapping districts: and that, as to the said sum of 3000*l.*, the residue of the premises of the Company should be exempt from the rate; and that, in reference to subsequent orders for rates, a similar principle might be acted upon.

The vestry of the said parish, having met and considered the said application of the Dock Company, resolved that no part of the sum of 6000*l.* directed to be raised by their said order of 17th January, 1856, had been incurred for a special benefit of that part of the parish not comprised in the London Docks; but that such expenses had been incurred for the equal benefit of the whole of the said parish. And they resolved that the Company were not entitled to any such exemption as prayed; and that, in reference to the general rate required to be levied under the Metropolis Local Management Act, the poor-rate was their only standard of rating.

The said Company having failed to pay the said rate *after demand, and after fourteen days' notice left for them on the premises so rated, this action has been brought for the amount of the said rate by the plaintiff, who was, at the time of making the rate, and still continues to be, the vestry clerk of the said parish, and also clerk to the trustees above mentioned. [*226

The Acts mentioned were to be taken as part of the case; and either party might, if thought necessary by him or them, refer to and read the London Docks Acts also as part of the case.

A plan of the London Docks, with the streets and other places surrounding and adjoining thereto, or intersecting the same, was also annexed, and was to be taken as part of the case.

The question for the opinion of the Court is:

Whether the trustees of the said parish were right in making the said general rate on the whole of the property of the Dock Company rated to the poor-rate of the said parish of St. George; or whether they ought to have limited the said general rate, as to as much thereof as was made for raising moneys required for paving expenses or charges, to such parts of the property of the said Dock Company in the parish as were formerly rated by the Paving Commissioners under the said Paving Acts, or to any other, and to what, part of the property of the said Dock Company.

If the Court shall be of opinion that the said general rate was rightly made on the whole of the Company's property rated to the poor-

rate as aforesaid, then judgment is to be entered for the plaintiff for the sum of 306*3*l. 1*s.* 8*d.*, and costs of suit.

*227] If the Court shall be of opinion that the rate ought *to have been limited to a part or parts only of the Company's property, then it is agreed to be referred to two persons severally named by the plaintiff and defendants, with power to such persons to appoint an umpire in case they should disagree, to award and determine, according to the principles laid down by the Court, the rateable value of the portion or portions of the Company's property to which the Court shall decide the rate ought to have been confined; and to determine for what amount judgment shall be entered. And it is agreed that judgment shall be entered accordingly: and in that case each party to bear their own costs.

The case was argued in last Term.(a)

Pashley, for the plaintiff.—The defendants contend that, under sect. 159 of stat. 18 & 19 Vict. c. 120, the vestry ought to have laid the rate, so far as it is to defray the expenses of paving, on only a portion of the property of defendants, because a part only is supposed to be benefited by the paving. But, under that section, the discretion is given to the vestry; and this Court will not inquire whether the vestry have come to a right conclusion. Therefore sect. 161, which requires the rate to be laid generally on property rateable to the poor-rate, will operate without restriction. Upon the principle of *Baddeley v. Gingell*, 1 Exch. 319,† it appears that the vestry judged rightly, and that they were not bound to adhere to the old assessment: but, for the purpose of applying sect. 159, it is enough that, as the case shows, it did not “appear” to the *228] vestry that the expense was *incurred for the special benefit of a part only of the property.

Sir *F. Kelly*, *contrà*.—The property is divisible into three parts: the docks themselves, consisting only of the basin filled with water; the quays round the water; and the warehouses and walls which constitute the outer circle of the premises. The expense of paving cannot have been incurred for the benefit of any but the third portion: and, if the different portions had belonged to different owners, there could have been no question as to this. The other two portions do not adjoin the street: and therefore *Baddeley v. Gingell* is inapplicable; besides which, in that case, the parties assessed had not, as here, executed the paving themselves. This is a much stronger case than *Paul v. James*, 1 Q. B. 832 (E. C. L. R. vol. 41), where every occupier in the liberty was made liable to the rate. The old practice here appears to have been just; and there is nothing in stat. 18 & 19 Vict. c. 120, to change the rights of the parties. Nor does sect. 159 give an absolute discretion to the vestry. Sect. 90 transfers to them the powers of the old Commissioners: such Commissioners had no right to rate premises not paved by them. “May,” in sect. 159, should be read as “must,” a construction often adopted; and this Court may well interfere: *Regina v. Tithe Commissioners*, 14 Q. B. 459 (E. C. L. R. vol. 68); *Macdougall v. Paterson*, 11 Com. B. 755 (E. C. L. R. vol. 73); *Rex v. Barlow*, 2 Salk. 609; *Hallett v. Overseers of Brighton*, 7 E. & B. 342 (E. C. L. R. vol. 90). [ERLE, J.—Is it desired that we should determine as to the facts?] That is the meaning of the parties.

(a) June 5th. Before Lord Campbell, C. J., Coleridge and Erle, Js.

**Pashley*, in reply, cited *Dorking v. Epsom Local Board of Health*, 5 E. & B. 471 (E. C. L. R. vol. 85). [*229]

Cur. adv. vult.

ERLE, J., now delivered the judgment of the Court.

We have had considerable difficulty in dealing with this case conclusively, so as to effect what justice seems to require, from the fact that the rate in question was made by the trustees under the order of the vestry. But, reading the question with which it concludes, with the statement at the beginning, that by agreement between the parties the case should be dealt with by us as if it had been granted by the Quarter Sessions upon appeal against the rate, we think, upon the principles we shall lay down, it will follow that the Dock Company ought to be relieved; and the trustees or vestry, and the Dock Company, applying those principles, may, without any great difficulty, and acting fairly and reasonably on both sides, arrive at the proper amounts.

Although stat. 18 & 19 Vict. c. 120, does not direct that the rating for paving expenses should be levied only upon such property as was at the time of passing that statute rated thereto, still we consider that, by the 159th section, the duty is cast on the vestry, in the cases to which it applies, to apportion the burden according to the benefit: and, if part of the property of the Dock Company has not equal benefit with the rest of the property in the parish rated to the poor from the paving expenses in respect of that part, the Company is entitled to be relieved pro tanto.

If the fact of the inequality of benefit exist, although *it has not appeared to the vestry, the Court of appeal would be bound [*230] to direct the rate to be amended according to the truth of that fact. The difficulty, of course, is to lay down the rule by which the proportion of benefit derived from the paving expenses by different kinds of property is to be ascertained. Before stat. 18 & 19 Vict. c. 120, the rate was directed to be levied on the property situate within the streets, lanes, and places which were paved, or adjoining to or opening into the same, as if the benefit from the pavement was considered to depend on the proximity of the property thereto. By sect. 159 of that statute, the attention of the vestry is directed to the consideration of the benefit alone, without limitation in respect of proximity; and so some departure from the former usage of rating is justified. But the general purview of the statute is directed more to a change in the power of administration than to a change in the liability of property to be rated: and the presumption is strong against any great change of liability having been intended, as no such intention is expressed; certainly strong against an intention that property which had been rated at 17,000*l.* should be made liable to be rated at 73,000*l.* per annum by a statute passed mainly for the better local arrangement of the metropolis in these respects.

It seems to us that the former usage ought not to be departed from, and the former exemption ought not to be taken away, unless it be proved that there is equality of benefit for equality of rate. The case does not state the facts relating to that part of the profits from the Dock property which in any way depend on, or are connected with, the benefit from paving expenses: but it seems certain that some profits from a dock are not immediately *connected with any use of paved [*231] streets, such as those from the use of the area covered with water

by ships, and from the use of bonded warehouses for goods which, having been imported, remain there for a time, and are then exported. If there are such profits, they certainly entitle the Company to an exemption from rate in respect of so much. Other profits there may be which are more referable to those sources than to inland transit; and these may, therefore, be entitled to partial exemption. We have suggested these as instances where the benefit from paving expenses would not be equal to that derived to other property adjoining to the paved streets and obtaining direct value from their use.

We think, upon the whole, that the rate should be referred to the arbitrators named at the close of the case, who will probably have no difficulty in applying the principles we have now laid down to the facts which may be proved before them, and which their habits will enable them to ascertain more readily than we can. If, however, any serious difficulty should arise, the parties are at liberty to apply to the Court on a fuller statement of the facts.^(a)

(a) See *Regina v. Great Western Railway Company*, Q. B., July 3, 1858.

***282] *JOHN WHEELTON, LYS SEAGAR, and CHARLES LANE
v. EDWARD BRYDGES HARDISTY, JACOB BELL, and
WALTER BARKER.**

Count. For that, by a deed poll sealed by defendants, directors of The W. Life Insurance Association, after reciting that plaintiffs, being interested in the life of J., had caused to be delivered into the office of the association "a proposal for assurance in writing," "whereby it was declared that," *inter alia*, J. had not had any fit since childhood, "and that the said association had thereupon undertaken the proposed assurance, subject to the terms and conditions therein and thereunder expressed." Usual covenant to pay if J. died. Breach, non-payment. The conditions were set out, and contained no further warranty than above that J. had not had fits.

Plea 1. Fraud. Pleas 2 and 3. That the policy was obtained by false statements and false concealments of material facts. Plea 4. That the "declaration in the policy and in the declaration in this cause mentioned," that J. had not had any fit since childhood, was untrue. Issue was taken on these pleas. On the trial it was proved that the proposal, in fact signed, referred to the answers of J., his ordinary medical attendant, and a friend to whom he had referred, rendered to another insurance company; and that it concluded with a declaration "that we believe the above particulars and statements are true." The jury found that statements made by J., his usual medical attendant, and his private referee, including a statement that he had not had fits since childhood, were false, and that there was fraud on their part against defendants, but no fraud on the part of the plaintiffs.

Held by the Q. B., on a point reserved, that the life insured, the medical referee, and the private referee were not the agents of the assured, so as to make their fraud, misrepresentation, or concealment that of the assured; and that the plaintiffs were entitled to the verdict on the issues joined on pleas 1, 2, and 3. Affirmed on appeal in the Exchequer Chamber.

Held also, by the Queen's Bench, that the 4th plea referred to the statement recited in the policy, and was proved, and the defendants were entitled to the verdict and judgment thereon. Affirmed, as to the verdict, on appeal in the Exchequer Chamber. But

Held by the Exchequer Chamber, reversing the judgment of the Queen's Bench, that there was no warranty of the truth of the matters recited in the policy to have been declared in the proposal, or anything in the nature of the contract, as set out on the record, showing an intention that the truth of these matters should be the basis of the contract; and consequently that the plea, not averring a scienter, was bad, and the plaintiffs entitled to judgment on it non obstante veredicto.

A suggestion of error in the judgment on a verdict, and an appeal against the rule directing how the verdict shall be entered, may be made at the same time and argued together.

There was also a replication on equitable grounds to the 4th plea: that, before the policy was entered into, defendants circulated a prospectus, whereby they undertook that their policies should be unquestionable, except on the ground of fraud; and that plaintiffs were induced to enter into the policy on the faith thereof. Issue thereon.

On the trial it appeared that such a prospectus was issued; but no express proof was given that the plaintiffs saw it or were induced by it to make the policy. The jury found for the plaintiffs.

Held by Wightman, Erle, and Crompton, J., dissentiente Lord Campbell, C. J., that there was no sufficient evidence to warrant this finding. On this part of the judgment below the Exchequer Chamber pronounced no opinion.

COUNT against three of the directors of The Westminster and General Life Assurance Association: * "For that, by a certain policy of [233 insurance made by the defendants with the plaintiffs, the same being the deed of the defendants, and sealed with their respective seals: after reciting that the plaintiffs, being interested in the life of one Jodrell, were desirous of effecting such assurance as was thereafter expressed with the Association, and had caused to be delivered into the office of the said Association a proposal for assurance in writing, bearing date the 8th day of September, 1852, whereby it was declared that the age of the said Jodrell did not then exceed 35 years; that he had not had rupture or any fit or convulsion since childhood, or gout, asthma, insanity, or spitting of blood; that he had not had any habitual cough or any disease of the lungs or heart, or any other disease or disorder tending to the shortening of life: and that the said Association had thereupon undertaken the proposed assurance, subject to the terms and conditions therein and thereunder expressed: and that the plaintiffs had paid to the said Association the sum of 64*l.* 10*s.*, being the premium payable in respect of such assurance for twelve calendar months from the date thereof: And the defendants did thereby agree that," if Jodrell should die within the year, or if the plaintiffs during the continuance of the assurance should pay the annual premiums, then and in such case the funds of the Association should be liable on his death to pay to the plaintiffs 1500*l.*, "provided nevertheless that the said policy and the assurance thereby effected were and should be subject and liable to the several conditions, restrictions, and stipulations thereunder stated." The count then stated some provisions in the policy as to the mode in which the funds should be made available (not *material), and [234 proceeded: "And the plaintiffs say that the said conditions, restrictions, and stipulations under the said policy, so far as they are material to the present case, were and are as follows.

"3. Policies will become void if the person whose life is assured shall go beyond the limits of Europe, unless with the previous consent of the directors; but no part of the high seas in the passage from any part of Europe to any other part of Europe shall be considered beyond such limits.

"4. Policies will also become void if the person whose life is assured shall enter into actual naval and military service, unless a premium adequate to the extra risk to be settled by the directors shall have been paid before entering into such service, or shall be paid within sixty days thereafter."

"7. All claimants upon the death of any person whose life shall have been assured by the said association must, if required, make proof of such death, and give such further information respecting the same as the directors shall think reasonable."

General averments of performance of conditions precedent. Averment of Jodrell's death. Breach: non-payment of 1500*l*.

Pleas. 1. That the said policy was effected through the medium of the plaintiffs by and on behalf of The Norwich Union Reversionary Interest Company; and that the plaintiffs are now suing as trustees for that Company; and that they, the defendants, were induced to enter into the said policy, and the policy was effected with and obtained from them the defendants, by, through, and by means of fraud and covin, and *235] the *fraudulent misrepresentations and concealment of material facts with reference to the said assurance, of and by the said Company and their agents concerned in effecting the same.

2. That the said policy was effected through the medium of the plaintiffs by and on behalf of The Norwich Union Reversionary Interest Company; and that the plaintiffs are now suing as trustees for that Company; and that the said policy was made by the defendants on the faith and in reliance on the truth of certain particulars and statements contained and embodied in and referred to by a certain proposal for assurance made by and on behalf of the said Company to the defendants, which proposal served as and was a basis for the said contract of assurance. And the defendants say that in and by the said proposal for assurance, and in and by the said particulars and statements contained and embodied and referred to therein, it was, amongst other things, declared that Jodrell had not had any organic or chronic disease, or been afflicted with fits or mental derangement, whereas in truth and in fact, prior to making the said proposal, Jodrell had been and was subject to, and also from time to time afflicted with, chronic and organic diseases and maladies, causing and attended with mental derangement, to wit, delirium tremens and insanity, and had also since his childhood had fits, to wit, epileptic fits: all which the persons making the said declarations at the time of making the same well knew. And the defendants further say that these were facts material and necessary to be made known to them; and that the said policy was obtained by false misrepresentation in this behalf.

*236] *3. That the plaintiffs are suing as such trustees as in the last preceding plea mentioned; and that the said policy was made and effected as in that plea also mentioned, and upon such faith and reliance as therein also mentioned; and that, in and by the said proposal for assurance, being such basis, and so made, by and on behalf of the said Company, as in the said last plea also mentioned, to the defendants, and in and by the said particulars and statements contained and embodied and referred to therein, it was amongst other things declared that Jodrell was not uniformly temperate in his habits, and habitually he took too much wine, and was occasionally, though only occasionally, intoxicated; but that there was considerable improvement in him in this respect. And the defendants say that at the time of making that declaration and the said proposal Jodrell was in truth and in fact habitually intemperate and frequently intoxicated, as the persons making the said declaration then well knew; and that no improvement, within the knowledge of the said last-mentioned persons, had taken place in this respect; and that knowledge as to the temperance or intemperance of the habits of the said Richard Paul Hase Jodrell was material and necessary to the defendants prior to making or entering into the said policy; and that

they had not such knowledge prior to making the same; and that the said policy was obtained by false misrepresentation in this behalf.

4. That the said declaration in the said policy and in the declaration in this cause mentioned, that Jodrell had not had any fit or convulsion since childhood, and that he had not had any disease of the lungs or heart, or any other disease or disorder tending to the *shortening of [*237 life, was not true; but, on the contrary, the defendants say that Jodrell, since childhood, and before the making of the said declaration in the said policy mentioned, had fits, to wit, epileptic fits, and that, before the making of the said declaration, Jodrell had had a disease or disorder tending to the shortening of life, to wit, delirium tremens.

Replications: The plaintiffs join issue on all the defendants' pleas: and, for a second replication on equitable grounds to the second plea, the plaintiffs say that, before the said policy was entered into as in the declaration alleged, the defendants published to the plaintiffs and others a prospectus stating their intention of carrying on the business of insurances upon lives, and to make such insurances as in the declaration mentioned. And the defendants thereby stated, represented, and undertook, to and with the persons who should effect insurances with them, and, amongst others, to and with the plaintiffs severally and respectively, that assurances which should be effected with the defendants by such persons or the plaintiffs severally and respectively, and amongst others the assurance in the declaration mentioned, should be unquestionable, except when fraud might be practised in obtaining them. And the plaintiffs say that they were induced by the defendants to effect, and effected, the said policy in the declaration mentioned with the defendants in consequence of and upon the faith of the said statement, representation, and undertaking, and that, by reason of the premises, it was in equity subject to the terms that it should be unquestionable, except in case fraud should be practised in obtaining the said assurance. And the plaintiffs say that the particulars and statement *and pro- [*238 posal in the plea mentioned not to be true respectively were not fraudulent, nor was there any fraud whatsoever in the same proposal or any of the statements or allegations therein contained or referred to, nor was any fraud practised in obtaining the said assurance.

Similar replication to the 3d and 4th pleas. Issue thereon.

On the trial, before Lord Campbell, C. J., at the Guildhall sittings after Michaelmas Term, 1856, it appeared that, in 1852, The Norwich Union Reversionary Interest Company, of which the plaintiffs were trustees, had agreed to make a loan to Mr. Jodrell of a large sum on the security of his reversionary interest on some estates, which were to come to him if he survived his father. The Company, having this in view, applied to The European Life Insurance and Annuity Company for an insurance for 5000*l.*, to cover their interest pro tanto. The European Life Insurance and Annuity Company accepted the proposal. Mr. Norris, the secretary of The Norwich Union Reversionary Interest Company, next applied verbally to the actuary of The Westminster and General Life Assurance Association, proposing a further assurance with that Company on Jodrell's life. With reference to this verbal proposal he sent the following letter. "Norwich Union Reversionary Interest Company, 23, Lincoln's Inn Fields, 4 Sept. 1852. Dear Sir, I have the pleasure to hand you the papers of the European Life Office in

reference to the proposal on the life of Mr. Jodrell. I also send you blank forms, upon which you will perhaps be kind enough to have them copied. May I further beg you to be good enough to forward the *239] original copies on to Mr. Clements of the Monarch on *Thursday without fail. Yours, faithfully, HY. NORRIS, Sec^r. The Sec^r of the West^r Life Office.

"The amount we require to insure is 1500*l*."

Enclosed were seven documents.

1. A list of the various offices which had already accepted the life, and the sums for which each had accepted it; amongst others, the European for 5000*l*.

2. A printed form filled up in manuscript. It was headed "Medical Referee. Questions respecting R. P. Hase Jodrell, Esq., of Childwickbury House n^r St. Albans, to be answered by F. R. Spackman, Esq., Surgeon, &c., Harpenden near St. Albans. The answers will be considered strictly confidential." The parts printed in italics were in manuscript, the rest printed. Then followed 18 printed questions, with blank spaces left for the answers, which were filled up in manuscript. On the back was a printed letter from the secretary of The European Life Assurance Company, informing the person to whom it was addressed that a proposal had been made to that office to effect an insurance on the life of . . . , and that reference had been made to him as his ordinary medical attendant, and that the answers to the questions would be held strictly confidential. The answers to the questions were signed by Mr. Spackman, and dated 11th August, 1852.

No. 3 was a private note from Mr. Spackman to the secretary of The European Life Insurance and Annuity Company, accompanying the answers to the above queries, and purporting to contain a summary of his opinion as to the value of Jodrell's life.

No. 4. A similar printed form containing questions addressed, on *240] behalf of The European Life Insurance and *Annuity Company, to a private friend of the life proposed to be insured in their office. The answers were filled up, and signed by J. Brade, August 13, 1852.

No. 5. A confidential report on the state of Mr. Jodrell's health, from Mr. Spackman, dated 19th August, 1852, addressed to The European Life Insurance and Annuity Company, purporting to be made after consulting Jodrell, and containing, as an excuse for Jodrell not signing it himself, a statement that he had slightly burned his hand.

No. 6. A confidential report by the medical officer of The European Life Assurance and Annuity Company on the value of the life of Jodrell, purporting to be made on a personal examination of him, and to be based upon his answers. This report was dated 20th August, 1852. These six papers contained, in substance, a statement that Mr. Jodrell was naturally of a strong constitution; that he had formerly been intemperate, but had since his marriage lived soberly; that he never had had fits; and that he was then in good health; and that his life might be taken; but, in consideration of past irregularities, at the higher premium of 4*l*. 6*s*. per cent.

No. 7 was partly printed and partly in manuscript. The following is a copy of it: the words in italics were in manuscript; the words printed in Roman characters were in the printed form.

*No. 2. LIFE OF ANOTHER. [*241
THE EUROPEAN LIFE INSURANCE AND ANNUITY COMPANY.

OFFICE, NO. 10, CHATHAM PLACE, BLACKFRIARS, LONDON.

Particulars required to be stated by a person proposing to effect an Insurance on the Life of Another.

1. Name of the person whose Life is proposed to be Insured Profession, or other description (If a Married Female, her maiden Name to be stated.)	<i>Richard Paul Hase Jodrell, Esq. of Childwickbury House, nr. St. Albans.</i>
2. Place and date of birth.	Born at London on the 3d day of August, 1818.
3. Whether married or Single?	Married 1848.
4. Nature of past and present employment.	
5. If ever resident abroad, state where, when, and for what period.	No.
6. Whether the person has had the small-pox or cow-pox?	Has been Vaccinated.
7. Whether the person has had convulsions since childhood, or at any time had Gout, Rupture, any Fit or Fits, Dropsy, Asthma, Mental Derangement, or Spitting of Blood—and if so, which?	No.
8. Whether afflicted with habitual Cough, Disease of the Lungs, or any other Disorder tending to shorten life?	No.
9. Whether of sober and temperate habits? and if now, and ordinarily, in the enjoyment of good health?	Has lived freely, but since his marriage is sober and temperate.
10. Whether any near Relation has been afflicted with or died of Consumption, or any Hereditary Complaint?	No.
11. If Parents are alive, state their age. If dead, at what age, and of what complaint they died?	ALIVE, Father, aged 71. Mother, aged upwards of 60. DEAD, Father, aged Complaint DEAD, Mother, aged Complaint
12. Name and Residence of an intimate Friend (not a near Relative, nor one interested in this Insurance) to whom reference can be made as to health and habits.	<i>James Brade, Esquire. Address 15 Regent St. Occupation</i>
13. Name and Residence of the usual Medical Attendant, and length of acquaintance. If the person have no Medical Attendant, the fact to be stated, and reference made to two other disinterested intimate Friends.	<i>F. R. Spackman, Esqr. Harpden, nr. St. Albans.</i>
14. Has the life been proposed to, accepted, or declined by any other office? and, if so, what office or offices? If accepted, state at what rate.	Declined by "Lavo," "Legal and General," "Rock" and "Albert," accepted by several at £4 6s. per Cent.*
15. Is there any other circumstance material to be known in judging of the eligibility of the proposed life for Insurance?	See answer to No. 9.
16. Sum to be Insured?	£5000.
17. For what term?	Life.
18. With or without profits	Without.
19. Name, residence, and profession, or occupation of the person in whose behalf the Insurance is to be made.	<i>John Wheelton, of Moopham Bank, Tunbridge, Esqr. Jas. Lys Senger, of Millbank, Westminster. Esqr. Reed. Charlton Lane, of the Oval Kennington. CIV.</i>

DECLARATION TO BE SIGNED BY THE PERSON PROPOSING THE INSURANCE.

WE, the above-named John Wheelton, Jas. Lys Senger, and Charlton Lane, do declare that we have an interest in the Life of the above-named Richard Paul Hase Jodrell to the amount of the Sum proposed to be insured; that the above-written particulars are fully and truly stated, and that the age of the person proposed for Insurance does not exceed thirty-five years; and we agree, that if any material circumstance touching his age or state of health be untruly stated in, or fraudulently omitted from, the above statement, then any Insurance which may be founded hereon shall be void, and all moneys which shall have been paid on account thereof shall be forfeited to the Company.

Dated at London, this 13th day of August, 1852.

Witness (Sgd.)

W. B. Ford

(Sgd.)

For and on behalf of the above named.

HY. NORRIS.

*The actuary of The Westminster and General Life Assurance Association, on the 7th September, 1852, wrote to Mr. [*242 Norris to say that his Company would accept the proposal for 1500*l.* at 4*l.* 6s. per cent. On the following day the policy was executed; and

at the same time a formal proposal was filled up and signed by Mr. Norris for the plaintiff. It was partly in print, partly in manuscript. The following is a copy of it.

*243] *LIFE OF ANOTHER.

WESTMINSTER AND GENERAL LIFE ASSURANCE ASSOCIATION,

No. 27, KING STREET, COVENT GARDEN, LONDON.

Particulars required from Persons proposing to effect Assurances on Lives in this Society, which must be submitted to the Board of Directors on Tuesday.

- | | |
|---|--|
| 1. Name, Residence, and Profession, Business or Occupation of the Person on whose behalf the Assurance is proposed. | } <i>John Wheelton, of Morpham Bank, Tenbridge, Esquire, James Lys Seager, of Millbank, Westminster, Esquire, and the Rev. Charlton Lane, of the Oval Kensington, Clerk.</i> |
| 2. Name, Residence, and Profession, Business or Occupation of the Person whose Life is proposed to be assured. | |
| 3. Place and Date of Birth. London. | <i>Richard Paul Hass Jodrell, Esquire, of Childwickbury House, near St. Albans.</i> |
| 4. Age next Birth-day. | <i>3d August, 1818.</i> |
| Evidence of which must be produced at the time of effecting the assurance. | <i>Thirty-five years.</i> |
| NOTE.—The usual proof is the production of a Certificate of Baptism, but under special circumstances other evidence, such as a declaration made by some competent person before a magistrate, will be admitted. | |
| 5. Is the Person whose Life is to be assured Married or Single? | } <i>Vide Papers received by The European Life Office.</i> |
| 6. Is he employed in any Naval or Military Service? | |
| 7. Has the Party whose Life is to be assured had the Small-Pox, or been Vaccinated? | |
| 8. Has the Party whose Life is to be assured had Rupture, or any Fit, or any Convulsion (since childhood), or Gout, Asthma, Insanity, or Spitting of Blood; and if so, which? | |
| 9. Has the Party whose Life is to be assured had an habitual Cough, or any Disease of the Lung, or Heart, or any other Disease or Disorder tending to the Shortening of Life? | |
| 10. Name and Residence of a Medical Practitioner, to be referred to for information as to present and general state of Health. | } <i>Has known h years: has attended h years.</i> |
| How long has the Practitioner referred to known the Person whose Life is proposed to be assured, and during what period has he been the usual Medical Attendant of such Person? | |
| 10. Name of an intimate Friend, to be referred to for similar information, and how long has he known him? | } <i>Has known h years.</i> |
| 11. Has a Proposal to assure your Life been declined by any Office? | |
| 12. Is there any other Circumstance, or Information, touching the past or present state of Health or habits of Life, of the Party whose Life is proposed to be assured, with which the Directors ought to be made acquainted? | |
| 13. Sum to be assured. | <i>£1500.</i> |
| 14. Term for which the Assurance is required. | <i>for Life.</i> |
| 15. Will the Proposer pay the rate of Premium for participating in profits? | <i>No.</i> |

DAY OF APPEARANCE.—TUESDAY AT TWO O'CLOCK.

PROPOSAL REQUIRED TO BE SIGNED BY THE PERSON WHO PROPOSES TO MAKE AN ASSURANCE ON THE LIFE OF ANOTHER.

WE, the above-named *John Wheelton, James Lys Seager, and Charlton Lane*, do hereby propose to make an Assurance with the Westminster and General Life Assurance Association, in the sum of *One thousand five hundred pounds*, upon and for the continuance of the Life of the above-named *Richard Paul Hass Jodrell*, and do hereby declare that we believe the above Particulars and Statements are true.

Dated this 8th day of September, 1852.

Witness,
Edw. Cutbush.

for the above-named Parties.
(Signed) *H. NORRIS.*

Policy, No. 935.

Date of Assurance, 8th Sept. 1852.

Written by *Edw. Cutbush.*

Due 8th September.

Deliver Policy to *H. Norris, Esq.*

Send Notice to 23 Lincoln's Inn Fields.

Sum Assured £1500. Pr. per Cent. per Ann.	£4 6
	15
	64 10
	Pr 3 0
Policy signed by <i>EDWARD B. HARDISTY.</i>	
<i>JACOB BRILL.</i>	67 10
<i>WALTER BARKER.</i>	

*The policy was accurately set forth in the count.

It was proved that Jodrell was, at the time of the statements made [*244 to The European Life Assurance and Annuity Company, neither sober nor temperate; that he had had epileptic fits, and was subject to delirium tremens; and evidence was given that these facts were known to Jodrell, to his medical referee, Spackman, and to his private referee, Brade, and that the facts were fraudulently misstated by them: but there was no ground for doubting that the plaintiffs, and all persons connected with their Company, believed in the accuracy and honesty of the statements, the object of the misstatements being in fact to deceive them, and so to obtain the loan for Jodrell. A prospectus of The Westminster and General Life Association was called for by the plaintiffs and produced by the defendants. It was read in evidence. It contained the following passage: "This Association was established in the year 1836, by members of The Westminster Fire Office, founded 1717, and has transacted a considerable amount of business with parties connected with that office and the public generally. The successful operation of the Association in its immediate circle of influence has been such as to determine the directors to enlarge its sphere of usefulness, and to advance, to the utmost of their power, so beneficial a cause as that of life assurance, and, with a view that their Association shall present to the assurer every privilege and advantage which practice has shown to be consistent with the safety of the Society, a thorough revision has been made of the conditions upon which assurances are granted, and every restriction which experience has shown not to be absolutely necessary to be retained has been withdrawn, so that all assurances *with the Association shall be unquestionable [*245 except where fraud has been practised in obtaining them. The directors have also reconsidered the table of premiums charged for assurance, the whole of which they have had recalculated, and the scale they now submit is as nearly as possible adjusted to the risk of the particular assurance undertaken." No express evidence was given that the plaintiffs' officers had seen this prospectus, or were induced to make their proposal in consequence. The Lord Chief Justice expressed his opinion that, in order to sustain the first three pleas, it was necessary for the defendants to prove moral fraud in the plaintiffs, or some one for whose fraud they were responsible; and that fraud in the life insured, or the medical or private referee, would not support the defence under these pleas. He, however, left the case to the jury, reserving the questions of law.

The jury, in answer to questions from the Lord Chief Justice, found that Jodrell, the life insured, Spackman, the medical referee, and Brade, the private referee, had all been guilty of fraud against The Westminster and General Life Assurance Association in obtaining the policy; but that there was no fraud on the part of The Norwich Union Reversionary Interest Company or of any of their officers; and that the prospectus had been seen by the plaintiffs before they effected the policy; and that they had acted upon the faith of such prospectus in effecting the said policy. The Lord Chief Justice thereupon directed the verdict to be entered for the defendants, upon the issue taken on the fourth plea, and for the plaintiffs on all the other issues, including those on the equitable replications, reserving *leave to each side to move to enter the [*246 verdict for them on the issues found against them.

In Hilary Term, 1857, Sir *F. Thesiger*, for the plaintiffs, obtained a rule to show cause why the verdict should not be entered for the plaintiffs on the issue joined on the fourth plea, on the ground "that it alleges an absolute declaration, whereas the declaration, proved at the trial was a qualified one, viz., to the belief of the plaintiffs, and the plaintiffs are not bound by the misrecital in the policy;" and why judgment should not be entered non obstante verdicto, "on the ground that it appears by the record that there was no warranty of the truth of the declaration; it is not stated in the policy to be the basis of the contract, or to be one of the conditions upon which the policy is to depend."

Byles, Serjt., for the defendants, also at the same time obtained a rule to enter the verdict for the defendants on the 1st, 2d, and 3d pleas, "on the grounds that the misrepresentations practised by the referees and the life insured respectively avoid the policy, and that proof of the scienter is unnecessary. And why the verdict should not be entered for the defendants upon the equitable replication to the 2d, 3d, and 4th pleas, on the grounds that there was no evidence that the prospectus was published before the policy was executed, or that the plaintiffs had ever seen the prospectus, or had acted upon it, or made it part of the contract. That the fraud proved was fraud within the meaning of the prospectus. That the word fraud in the prospectus comprehends 'legal' fraud. And also on the grounds that the equitable replications to the 2d, 3d, and 4th pleas do not show that the contract in the policy ought to be rectified *247] by the prospectus, and that no equity in the plaintiffs is disclosed by those replications. Or why the judgment for the plaintiffs herein should not be arrested, or judgment entered for the defendants notwithstanding the verdict found for the plaintiffs on the issues joined on the replications if the verdict for the plaintiffs on those replications is to stand."

It was arranged that the two rules should come on together; when the counsel for the plaintiffs should at the same time argue in support of their own rule, and show cause against that of the defendants, and that then the defendants' counsel should be heard.

The case was argued in Easter Term, 1857.(a)

Sir *F. Thesiger*, Sir *F. Kelly*, and *Macnamara*, for the plaintiffs.—It is material to call attention to the form of the documents used in this case, as they differ from those usually adopted by insurance companies. The policy, which is the deed of the Company only, recites as a fact that a proposal for assurance had been delivered into the office containing certain statements. It does not go on, as is usual, to declare that this proposal is the basis of the contract. The proposal itself concludes with a statement that the parties proposing the insurance "declare that we believe the above particulars and statements are true." The usual course in life insurance is to append to the proposal, as is done in the printed form of The European Life Insurance and Annuity Company (ante, p. 241), a declaration that the statements are absolutely true, and *248] that if they are not true the policy shall be forfeited. These matters are very material in determining whether the verdict should stand for the plaintiffs on the issues joined on the first, second,

(a) May 4th, before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js. May 5th, before Lord Campbell, C. J., Erle and Crompton, Js.; and May 8th, before Lord Campbell, C. J., Wightman, Erle, and Crompton, Js.

and third pleas. That, in effect, depends upon the question whether the life assured, Jodrell, and the medical referee, Spackman, and the private referee, Brade, were so far identified with the assured as to make fraud or misstatement on their part avoid the contract. It is sometimes laid down generally that the life assured is the general agent of the person procuring the assurance, but it will be found that the cases do not establish any such rule. It is so stated in the marginal note to *Everett v. Desborough*, 5 Bing. 503 (E. C. L. R. vol. 15); but no such point was decided in the case. There the action was on an Atlas policy, the form of which is partly given in the report. By that form of policy, it is stipulated that parties proposing an insurance shall state various things, and amongst others the names and residences of two referees, one to be the usual medical attendant of the party, and that "a declaration as to all the above points will be considered as the basis of the contract between the assured and the company. If such a declaration be not in all respects true, the policy will become void." The plaintiff there made the declaration, stating therein that a particular person named was the usual medical attendant of the life. That statement was untrue; and so, by the express terms of the contract, the policy was void. The plaintiff endeavoured to excuse the breach of warranty by showing that it was honestly made in consequence of misinformation given to him by the life: and the point decided was, that he had taken upon himself to warrant *the accuracy of that statement, however he had obtained it. *Morrison v. Muspratt*, 4 Bing. 60 (E. C. L. R. vol. 13), S. C. 12 B. Moore 231 (E. C. L. R. vol. 22), is sometimes cited as an authority for the doctrine that the life is a general agent; but in truth no point as to agency appears to have been mooted in that case; and, if it had been, it would be necessary to know the form of the policy to see how the point arose. *Maynard v. Rhodes*, 5 Dowl. & R. 266, is so reported as to afford no assistance. The ruling of the Lord Chief Justice appears to have been that a particular false statement by the life insured was a breach of a condition in the policy, and that it was immaterial that the party for whose benefit the life was insured was not privy to the falsehood. The complaint seems to have been made only of the latter part of the ruling, admitting that the statement was a breach of a condition in the policy; and a rule was refused. The terms of the policy are not given in the report: (a) and it is obvious that the case does not decide that every statement by the life insured is necessarily a breach of a condition in every policy. In *Rawlins v. Desborough*, 2 Moo. & R. 328, which was against the Atlas Company, and in which therefore it is probable that the policy was in the same form as that in *Everett v. Desborough*, 5 Bing. 503 (E. C. L. R. vol. 15), Lord Denman, C. J., after stating that he did not agree that the party whose life was insured was the general agent of the assured, says that "He is to answer all questions put to him; and if he answers them falsely, that will vitiate the policy;" but the verdict passed for the plaintiff, so that this opinion did not *become material. And the same remark applies to *Swete v. Fairlie*, 6 Car. & P. 1 (E. C. L. R. vol. 25). In *Huckman v. Fernie*, 3 M. & W. 505, 518,† in delivering the judgment of the

(a) See the statement by Wilde, Serjt., *arguendo*, 5 Bing. 512 (E. C. L. R. vol. 15); from which it would seem that in *Maynard v. Rhodes* the truth of the statement signed by the life was in the count, if not in the policy, treated as the basis of the contract.

Court, Lord Abinger says: "The wife" (whose life had been insured) "was not the agent of the husband for the purpose of effecting the policy; she was no otherwise his agent than to answer particular questions, such as the company might choose to ask of her, and she was only to answer questions which they were to put; and if they had put to her any questions of a kind calculated to elicit a particular fact said to be concealed, it might be questioned then whether or no she was not his agent for that purpose." These are the authorities usually cited as showing that the life and the referees are agents for the insured. If they were agents, any misstatement or concealment by them of a material fact would avoid the policy, whether fraudulent or merely blundering: *Fitzherbert v. Mather*, 1 T. R. 12. And it would be very imprudent to constitute strangers, who are to give confidential answers, agents for this purpose. If they were so constituted, a life policy would always be liable to be defeated because some confidential answer by the medical referee was inaccurate. The parties might however, no doubt, agree that the accuracy of the answers of the referees on every point should be the basis of the contract; it is usual in life policies to agree so far as that accuracy as to certain particular points shall be the basis of the contract. By the general law of insurance, without any special provision, the concealment of a material fact known to the assured avoids a policy: *Lindenau v. Desborough*, 8 B. & C. 586 (E. C. L. R. vol. 15). But, in the absence of some special terms in the policy, all that is to be

*251] *inferred from the reference is, that the insured believes that the referee has the means of knowledge and will impart them; it is for the Company to satisfy themselves that he has done so; the insured does not warrant his doing it.

The fourth plea proceeds on the assumption that the plaintiffs had, by their proposal in writing, declared absolutely that the particulars and statements therein were true. The proposal, however, in fact declared only that the plaintiffs believed them to be true. In the policy itself, and in the count, that proposal is recited as if the declaration was absolute; and the effect of that is said to be to make an express warranty. But, in the first place, the policy is the deed poll of the defendants; and their misrecital cannot bind the plaintiffs: to make the plea good it must be read as containing an implied averment that the declaration as recited in the policy existed in fact; and, if it is so read, the plaintiffs are entitled to the verdict; for it was not truly recited. Further, the mere recital that such a declaration was made is not equivalent to a statement that it was warranted to be accurate. If companies wish to do that, they can easily use the ordinary form that the declaration is to be the basis of the contract, and that, if it is inaccurate, the contract is to be void.

Lastly, as to the equitable replications. It was assumed by every one at the trial that the prospectus was circulated by the Company before this policy was made. Had any doubt been entertained, a single question would have cleared it up; and it is now too late to raise that objection. As to its having been seen by the plaintiffs and acted on by them,

*252] it was a fair inference which the *jury might well draw. And, if proved, the replications are good: *Wood v. Dwaris*, 11 Exch. 493.†

Byles, Serjt., Bovill, Cairns, Manisty, and Thrupp, contra.—First,

as to the three first pleas. The life must be considered as the agent of the parties effecting the insurance on him; they speak, and profess to speak, through him. In *Cornfoot v. Fowke*, 6 M. & W. 358,[†] it was held, by a majority of the Barons of the Court of Exchequer, that a false representation made by an agent, who did not know it to be false, affected his principal, who, though not privy to the false statement, knew the true state of facts. [Lord CAMPBELL, C. J.—I do not see how a party can, properly speaking, be agent in doing that which the principal could not do.] The word “agent” may perhaps not be technically accurate in such a case; but the responsibility is the same as in the case of principal and agent. In *Smith’s Compendium of Mercantile Law*, p. 396 (5th ed.), it is said: “Where one person insures the life of another, the party whose life is insured, if applied to for information, is, in giving it, impliedly the agent of the party insuring; who is, therefore, bound by his statements, and must suffer if they be false, though he himself was not acquainted with the life insured.” [Lord CAMPBELL, C. J.—Surely that is too general.] The proposition is qualified by what follows: (a) “But it seems that he is only the agent of the insured for the particular purpose of answering questions, and, therefore, that his concealment of a mortal disease known to himself, but the existence *of which was not involved in the inquiries of the Company, [*258 would not avoid the policy, if the existence of such disease were unknown to the party insured.” That qualification will not affect the present case. In *Rawlins v. Desborough*, 2 Moo. & R. 328, Lord Denman held that the life was not the general agent of the assured; and that therefore a policy on his life was not avoided by his not communicating a fact as to which he was not interrogated, and which he did not know to be material. The learned reporters have added a note, wherein they infer, from the authorities, that Lord Denman’s limitation is correct. But the law, so limited, is sufficient to determine this question in favour of the defendants. In *Lindenau v. Desborough*, 8 B. & C. 586 (E. C. L. R. vol. 15), it was held that, in answer to the question, “Do you know any other circumstances which ought to be communicated to the directors?” the insurers were entitled to know, not only what the party interrogated thought material, but what was material in fact; of which materiality the jury were to judge. The form of the policy in that case may be found in the report of *Everett v. Desborough*, 5 Bing. 503 (E. C. L. R. vol. 15), where the law was laid down in the most general terms; Best, C. J., saying: “I think we may decide this point on the general rule of law, that the principal is responsible for any representations made by his agent relating to the business in hand.” The same point was ruled in *Maynard v. Rhodes*, 1 Car. & P. 360 (E. C. L. R. vol. 12). (b) In *Huckman v. Fernie*, 3 M. & W. 505, 518,[†] where it was held that a wife, under the particular circumstances, was not the agent of her husband, who was insuring her *life, the Court said [*254 that, if the insurance Company “had put to her any questions of a kind calculated to elicit a particular fact said to be concealed, it might be questioned then whether or no she was not his agent for that purpose.” The principle, thus explained, does not appear to be contradicted by any authority. [Lord CAMPBELL, C. J.—Do you know of

(a) What follows was not in the first edition.

(b) At *Nisi Prius*; S. C. in *banc*, 5 Dowl. & R. 266 (E. C. L. R. vol. 16).

any case in which the clause was framed as here?] In *Morrison v. Muspratt*, 4 Bing. 60 (E. C. L. R. vol. 13) (which was acted upon in *Lindenau v. Desborough*, 8 B. & C. 586 (E. C. L. R. vol. 15), and *Everett v. Desborough*, 5 Bing. 503 (E. C. L. R. vol. 15)), it does not appear from the report that there was any special clause imposing a stricter condition than the clause in the present case. But, further, the argument for the defendants may be put on the ground that the plaintiffs, by referring to the life for information, have enabled him to commit a fraud, and are therefore answerable for his misrepresentation. [Lord CAMPBELL, C. J.—Can that be generally so in the absence of *mala fides* in the party referring?] The party who should suffer is the party who conferred the credit on the person giving the false information: Story's Commentaries on the Law of Agency, sect. 127; 2 Duer's Law and Practice of Marine Insurance, 420 (Lecture XIII. Pt. 1, s. 27).

Next, the fourth plea is good and was shown to be true in fact. It states a circumstance to have existed, the non-existence of which is asserted in the proposal of the plaintiffs incorporated in the policy. The declaration in that proposal is an absolute warranty; and, for this part of the argument, it is immaterial whether the untruth of the warranty was known to the assurer or not: *Anderson v. Fitzgerald*, 4 H. L. Ca. *255] 484. It is said, on the *other side, that the word "thereupon" is merely an allegation as to the time of the contract. But the contract is framed on the basis of the proposal: and an untruth in the assertion as to facts is as fatal as an untruth in the assertion as to age would be. That would clearly be so in the case of a marine insurance. And in *Carter v. Boehm*, 3 Burr. 1905, which was neither a marine or life insurance, Lord Mansfield laid down the rule generally that keeping back material circumstances amounted to fraud, because the risk in fact is different from that contracted for. [Lord CAMPBELL, C. J.—The rule so expressed would seem to imply knowledge: how else can there be concealment?] In *Lothian v. Henderson*, 3 B. & P. 499, 515, a case of a marine policy, Le Blanc, J., said: "I take this to be an established proposition, that every positive averment or allegation on the face of the instrument, and making a part of the written contract, whether inserted in the body of it, or written in the margin in a line with the body of the instrument, or transversely, amounts to a warranty, or condition. And if such allegation or stipulation be not strictly true, the assured cannot recover on the policy to whatever cause the loss be owing, whether the loss be connected with the subject of such warranty, or wholly independent of it: for it is a condition on which the contract is to take effect, which failing, the contract fails." Whether a statement made to induce a party to enter into a contract be known to be false, or be merely made by a party falsely assuming to have knowledge of the truth, is immaterial: per Maule, J., in *Evans v. Edmonds*, 13 Com. B. 777, 786 (E. C. L. R. vol. 76). This is not the less a warranty from *256] its being contained in the policy executed only by *the assurers. In *Foster v. Mentor Life Assurance Company*, 3 E. & B. 48 (E. C. L. R. vol. 77), a question arose whether a statement in a deed poll containing a life policy estopped the party accepting the insurance under it. Under the particular circumstances of that case, the Judges differed upon the question. The recital was to the effect that the assured had made a declaration of fact; and there was a distinct stipulation that the

policy should be void if the declaration was false in fact. That case shows that, if the issue here taken involves the question of fact whether there was such a declaration as alleged, that was for the jury, and there should be a new trial for misdirection. In *Burnett v. Lynch*, 5 B. & C. 589 (E. C. L. R. vol. 11), it was held that a lessee, taking possession under a deed poll of the lessor, was liable in covenant to pay the rent stipulated for in the deed. The statement of the day of sailing in a charter-party was held to be a condition precedent to the contract of the freighter: *Glaholm v. Hays*, 2 M. & G. 257 (E. C. L. R. vol. 40), which case was acted upon in *Ollive v. Booker*, 1 Exch. 416.† The principle is illustrated by *Flight v. Booth*, 1 New Ca. 370 (E. C. L. R. vol. 27).

The equitable replications are pleaded to the second, third, and fourth pleas. If the second or third pleas be proved, the replication is so far unimportant, inasmuch as it introduces no new element. It is therefore necessary to discuss only the replication to the fourth plea, which, for this part of the argument, must be assumed to be true. Now that the prospectus was published as alleged is not disputed. But, to raise the equitable answer to the fourth plea, it is essential that the representation in the prospectus should have been acted upon by the plaintiffs. This is alleged in the replication: but *it was not proved. If a [*257 Court of equity were asked to rectify the policy, it would require to be satisfied that the representation in the prospectus entered into the bargain. This equitable replication, in effect, undertakes to show how the policy ought to have been framed; because, where the Courts act separately, the province of the Court of equity is not to enforce, or to refuse to enforce, the policy, but to rectify it, leaving it to the Court of law to deal with the policy so rectified. The burthen of proof of the fact rests upon the party replying. The grounds upon which a Court of equity will act in rectifying an instrument are laid down by Lord Eldon in *The Marquis Townshend v. Stangroom*, 6 Ves. 328, 333, where he refers to the language of Lord Hardwicke in *Henkle v. Royal Exchange Company*, 1 Ves. Sen. 317, and of Lord Thurlow in *Shelburne v. Inchiquin*, 1 Bro. C. C. 338. The evidence must be of the strongest kind. The authorities will be found collected in *Story's Commentaries On Equity Jurisprudence*, s. 157, and in *Lyman v. United Insurance Company*, 2 Johnson's Ch. R. (New York) 630. It was there said by Chancellor Kent: "The difficulty in this case arises from the want of the requisite evidence of any agreement of the parties, different from that contained in the policy. The cases which treat of this head of equity jurisdiction, require the mistake to be made out in the most clear and decided manner, and to the entire satisfaction of the Court." [Lord CAMPBELL, C. J.—There the object was to reform a policy on the ground of mistake. ERLE, J.—In either case, whether the object be to reform an instrument or to restrain its enforcement, the strongest evidence is required. Lord CAMPBELL, C. J.—*However, the pre- [*258 sumption which is to be overcome is stronger where the application is on the ground of mistake than where it is on the ground of a representation made by one party to another.] In *Attwood v. Small*, 6 Cl. & F. 232, the necessity of giving the strongest proof, in order to authorize a Court to control the legal effect of an instrument, was affirmed in the most express terms: and this, both as to the fact of the misrepresentations there insisted on, and the circumstances showing that

the contract was based upon them; proof of a *dolus dans locum contractui*, in the language of the civil law. (a) The same strictness of proof is required in an action at law for false representations made by a defendant, inducing a contract with the defendant: *Shrewsbury v. Blount*, 2 Scott's N. R. 588, S. C., 2 M. & G. 475. As to *Wood v. Dwarris*, 11 Exch. 493,† cited on the other side, it will be found that the Court of Exchequer, especially Martin, B., there assumed the replication to be good; and the case came on upon a demurrer to the rejoinder. Indeed, this equitable replication suggests, not so much an answer to the plea, as a ground for treating the defence as fraudulent in contradicting the prospectus. Then, was the evidence in this case sufficient to satisfy these requisitions as to proof? A mere scintilla of evidence is, as is now established, not sufficient to support a verdict: nor is it enough to give evidence which is equally consistent with the case of the plaintiff and the case of the defendant: *Avery v. Bowden*, 6 E. & B. 962, 971, 973, 974 (E. C. L. R. vol. 88). (b) Now here nothing appeared but that the prospectus was issued when the defendants commenced business. That might or might not have *come*
 *259] to the knowledge of the plaintiffs: it is quite consistent with all that was proved, that the plaintiffs understood the defendants to be dealing upon the same terms as those of other insurance offices.

But, further, the clause in the prospectus has not the effect of altering the conditions of the instrument of contract, as suggested. The exception as to fraud was inserted for the benefit of the defendants: the result would be that, the policy being so framed as to be free from unnecessary restrictions, the defendants would adhere to such a policy, except in the single case of a fraud authorizing them to treat the contract as void. Suppose the plaintiffs could succeed in showing that all defences save that upon the ground of fraud were waived, the question would still remain, which has been already discussed, what are the persons whose fraud is to be sufficient to raise the defence.

ERLE, J., in this Vacation (July 4th), delivered the judgment of WIGHTMAN, J., himself, and CROMPTON, J.

The first question argued before us in this case was, whether the fraudulent representations made by the party on whose life the insurance was effected, and by the medical and other referee, amounted to fraud in the plaintiffs or their agent.

Lord Campbell, in effect, directed the jury that the life and the referees were not so far the agents of the plaintiffs as to make their fraud that of the plaintiffs, so as to make out a plea of fraud avoiding the policy. We think that the learned Judge was right in holding that, under the circumstances of the case, the life and referees were not the agents of the insured so as to make their fraud his.

*We quite agree with the rule, that the fraud of the agent who
 *260] makes the contract is the fraud of the principal: but we cannot regard the fraudulent parties in the present case as the parties intrusted to make the contract, or to represent the plaintiffs in so doing. It is not necessary to say to what extent such parties may be treated, in some cases, as the agent of the party insuring: in cases where the

(a) 6 Cl. & F. 330, 444.

(a) In Exch. Ch., affirming the judgment of Q. B. in *Avery v. Bowden*, 5 E. & B. 714 (E. C. L. R. vol. 85).

representations of the referees are made the basis of the policy, the answers of the referees are binding on the assured, so as to make the falsehood of their representations an answer to an action on the policy; but here, considering that the parties insuring were only required to state their belief as to the matters now under discussion, and that the life and referees were acting really in fraud both of the plaintiffs and defendants, and that they were not at all in the capacity of persons negotiating the contract, we can see no pretence to make them the agents of the parties insuring, so as to make their fraud that of the plaintiffs. We think, therefore, that the verdict for the plaintiffs on the pleas in question ought not to be disturbed.

The next question arises on an issue taken on the fourth plea, upon which the verdict was found for the defendants. The plaintiffs seek by the rule to enter the verdict on this plea for themselves, or, if it stands, to have judgment entered for them non obstante veredicto.

The declaration sets out the policy; by which it appears that the plaintiffs had caused to be delivered into the office of the defendants a proposal for assurance, by which it was declared that the life in question did not exceed 35 years, and that he had not certain specified complaints, or any other disease or disorder tending to shorten life, and that the defendants had *thereupon* *undertaken the proposed [261 assurance, subject to the terms and conditions therein and there- under expressed.

This declaration was, we think, rightly argued to amount to a warranty of the truth of the matters mentioned in the declaration set forth in the policy. It was a statement in the contract on which the plaintiffs founded their right of action, and described the subject-matter of the assurance. And we think that the parties agreed that the life the defendants were insuring was the life of a person not being thirty-five, and not having had any of the complaints specified. And that it was upon this statement that the parties agreed.

The plea proceeding to aver the falsehood of the facts in question was, we think, good as negating a warranty on which the contract was founded. And, there being ample proof of the falsehood of the matters referred to in the plea, the verdict on this plea must stand; and the plaintiffs are not entitled to judgment non obstante the verdict on that plea.

The plaintiffs, however, besides traversing this plea, replied to it by way of equitable defence: and, the defendants having traversed the replication, the plaintiffs obtained a verdict on that traverse with leave for the defendants to move to enter the verdict on that issue for them. And we have now to decide how the verdict is to be entered on this part of the record.

The replication in question stated, by way of equitable defence, that the defendants published to the plaintiffs and others a prospectus, by which they "represented and undertook, to and with the persons who should effect insurances with them, and amongst others to and with the plaintiffs," that all insurances with them "*should be unquestionable; except when fraud might be *practised in obtaining them;*" that the plaintiffs "were induced by the defendants to effect, and [262 effected," the policy in the declaration mentioned, "in consequence of and upon the faith of the said statement, representation, and under-

taking;" and that the declaration in the plea mentioned not to be true was not fraudulent; and that no fraud had been practised in obtaining the assurance.

In support of this replication the plaintiffs called for, and put in evidence, when produced, the prospectus of the defendants, which is to be taken as the prospectus which they circulated before and at the time when the policy in question was effected: but they offered no direct evidence that the plaintiffs had been cognisant of the prospectus, or had been induced by it to effect the policy.

The jury found that there was no fraud in the plaintiffs; but that there was fraud in the representations made by the life and the referees.

A verdict passed for the plaintiffs, subject to the questions, Whether there was any evidence of the plaintiffs knowing of or having been induced to enter into the policy by the prospectus; and, secondly, Whether the fraudulent misrepresentations made by the life and referees was not fraud within the meaning of the prospectus. On the first point the question is, Whether the proof was such as that a jury could reasonably come to the conclusion that the plaintiffs knew of and acted upon the prospectus. This is now settled to be the real question in such cases by the decisions in the Exchequer Chamber; which have, in our opinion, so properly put an end to what had been treated as the rule, that a case must go to the jury if there were what had been termed a scintilla of evidence.

*263] It seems to us that there was no such proof in this case as would justify a jury in finding the issue in question for the plaintiffs.

The evidence of the existence of the prospectus was quite as consistent with the plaintiffs not knowing of it, or not being induced to act upon it, as of their knowing and acting upon it. The plaintiffs may very well have effected the written contract without any reference to the prospectus: and modern cases have established that, where the party on whom the onus lies of proving an allegation gives evidence as consistent with one view of the case as the other, he fails in his proof.

The presumption of the written policy containing the real terms between the parties and the general presumption against fraud are presumptions against the facts stated in the replication; and the onus of proof was clearly upon the plaintiffs: and, according to the principles of equity as laid down in the decisions cited before us in the argument, very distinct proof ought to be given in proof of facts to raise the equity suggested in the replication.

We think, therefore, that the defendants are entitled to have the issue on the equitable replication to the 4th plea found for them. We entertain also very great doubt whether there was proof of any such absolute engagement and undertaking as set out in the replication, that the policies shall be unquestionable, except in case where fraud has been practised in obtaining them, especially if that fraud is to refer only to actual fraud by the assured. The prospectus states that, "with a view that their Association shall present to the assurer every privilege and advantage which practice has shown to be consistent with the safety of
*264] the Society, a thorough revision has been made of the conditions upon which assurances are granted, and every restriction which experience has shown not to be absolutely necessary to be retained has

been withdrawn, *so that* all assurances with the Association shall be unquestionable except where fraud has been practised in obtaining them."

The defendants seem to state that they had revised the terms and conditions on which they grant assurances with a view of removing all restrictions not absolutely necessary for the safety of the Company; and they represent that they have done so in such a way that policies shall be unquestionable except where fraud has been practised in obtaining them. They imply that they retain some restrictions and terms which are necessary for their safety, and may perhaps be treated as saying: "look at our conditions: we require a warranty of the age of the life and the acts of his not having had some particular complaint; and those matters can hardly be untrue unless there is fraud elsewhere: we keep that declaration and warranty in our policies to guard ourselves and as necessary for our safety; we cannot be safe without them; and these terms are to be binding." It would seem hardly consistent with the safety of the Company if they were absolutely to agree that the policies should be unquestioned in the case of fraud by the referees or life. We should, if necessary, be disposed to hold that the fraud of the life or referees was a fraud within the exception in the prospectus.

We cannot help adding that we entertain great fear of the effect of equitable replications like the present being allowed to control the operation of solemn deeds or instruments in writing. The same effect must be given to mere conversations; as the fact of the supposed *inducement being in writing can make no difference: so that we [*265 may have the terms of leases altered by loose declarations which a steward may have made in conversation; and every mercantile contract may be liable to be varied by evidence of talk on the exchange. We can understand such a defence where it amounts to a fraud or to a mistake, where a different contract is clearly established to have been intended: but the present case is founded on the notion, not of any fraud or mistake, but of being induced to enter into a contract by a statement that the party would not be bound by its written terms.

If the replication amounted to a statement of the terms really agreed upon differing from those in the declaration, it was decided in the recent case of *Reis v. Scottish Equitable Assurance Company*, 2 H. & N. 19,† in accordance with *Hunter v. Gibbons*, 1 H. & N. 459,† that the replication would be bad as varying from the declaration and seeking to enforce by action an equitable right. As, however, the case of *Wood v. Dwaris*, 11 Exch. 493,† is precisely in point, we should of course bow to that decision whilst sitting in a Court of co-ordinate jurisdiction.

It is sufficient, for the decision of the present case, for us to say that we think the equitable replication in question not proved, and that the verdict on the traverse taken on that replication should be entered for the defendants.

Lord CAMPBELL, C. J.(a)—In this very important, complicated, and difficult case, we have to begin by considering whether, [*266 according to leave reserved at the trial, the verdict for the plaintiffs on the first three pleas should not be set aside, and a verdict entered upon them for the defendants. These pleas all impute fraud to the plaintiffs.

(a) This judgment was read, partly by Coleridge, J., and partly by Erie, J., on the same day as the preceding, July 4th, in the absence of Lord Campbell, C. J., who was sitting at Nisi Prius.

The jury found that the plaintiffs, The Norwich Reversionary Company, who effected the policy on the life of Richard Paul Jodrell for their own benefit, had not been guilty of any fraud, but that Richard Paul Jodrell, whose life was insured, Frederick Spackman, the medical referee, and James Brade, the private friend of Mr. Jodrell referred to, had been guilty of fraudulent representations and concealment as to his health and habits. The question therefore arises, whether by reason of such fraudulent misrepresentations and concealment the verdict on the first three pleas ought to be entered for the defendants.

The plaintiffs, having agreed to advance 8000*l.* to Mr. Jodrell on his reversionary interest in certain estates which were to come to him on the death of his father, applied to The European Insurance Company to insure his life. By a written proposal, dated 13th August, 1852, they referred to Frederick Spackman, as his usual medical attendant, and to James Brade, as his intimate friend. Mr. Spackman and Mr. Brade answered in writing the usual questions put on such occasions, and gave a favourable account of his health and habits. The European having declined the insurance, on the 4th of September, 1852, Mr. Norris, the secretary of the plaintiffs' Company, wrote to the defendants, The Westminster Life Insurance Company, asking them to insure Mr. Jodrell's life for 1500*l.*, and handed over to them the papers of the European *267] Life Office in reference to the *proposal. The defendants likewise had a written answer by Mr. Jodrell to the usual questions put to the person whose life is to be insured, giving a favourable statement of his health and habits. The defendants, on the 7th of September, agreed to take the risk for 1500*l.*, adding fifteen years to Mr. Jodrell's actual age in calculating the premium. On the 8th of September, Mr. Norris, acting for the plaintiffs, filled up and signed the printed form supplied by the defendants, entitled "Particulars required from persons proposing to effect assurances on lives in this Society, which must be submitted to the Board of Directors." In answer to all the questions about the health of Mr. Jodrell, he wrote "Vide papers received by the European Life Office." This document contained the following: "Proposal required to be signed by the person who proposes to make an assurance on the life of another." "We, the above-named John Wheelton," &c., "do hereby propose to make an assurance with The Westminster and General Life Assurance Association, in the sum of 1500*l.*, upon and for the continuance of the life of the above-named Richard Paul Hase Jodrell, and do hereby declare that *we believe the above particulars and statements are true.*"

Under the signature of Mr. Norris were subjoined words and figures in the following form:

"Policy, No. 935.
Date of Assurance, 8th Sept. 1852.
Written by Edw. Cutbush.
Due 8th September.
Deliver policy to H. Norris, Esq.
Send notice to 23 Lincoln's Inn
Fields.

Sum assured £1500.	
Pr. per Cent. per Ann. - - - -	£4 6
	15
	64 10
	Py. St. 3 0
	67 10

Policy signed by EDW. B. HARDISTY.
JACOB BELL.
WALTER BARKER."

*The policy bears date the same 8th of September, and recites that the assured "had caused to be delivered into the office of [268 the said Association a proposal for assurance in writing, bearing date the 8th day of September, 1852, whereby it was declared," &c. This policy does not (like the policies of the Atlas and some other assurance Companies) contain or refer to a condition in the following form, after stating the questions to which answers are required—"A declaration as to all the above points will be considered as the basis of the contract between the assured and the Company. If such a declaration be not in all respects true, the policy will become void, and the premium will be forfeited." (See 5 Bing. 504.)

In point of fact the plaintiffs did believe the particulars and statements in the papers received from the European Office, and in Mr. Jodrell's answers, to be true; but it was known, not only to Mr. Jodrell himself, but to Mr. Spackman and Mr. Brade, the referees, that his habits had been very intemperate, and that he had several attacks of epilepsy and delirium tremens.

The judge at the trial directed the jury that, in the present case, the assured were not answerable for the fraudulent misrepresentations and concealment of the party whose life was insured, or of the referees: and I am still of opinion that this direction was right.

On behalf of the defendants, it has been very powerfully argued, before us, that the person whose life is to be insured (as he is usually called, the "life"), and the referees, are always to be considered, if not the agents of the assured to effect the policy, at least the agents of the assured in giving answers to all material questions which may be put to them respecting the matters to which they may properly be interrogated. Although this doctrine *has some sanction from language which [269 has been used by judges, it seems to me to be contrary to principle; and the decisions cited in support of it admit of an explanation, which leaves me at liberty to condemn it. A policy may no doubt be framed, which shall make the assured liable for any material misrepresentation or concealment by the "life" or the referees: but what we have to consider is, whether, where the policy contains no express condition for this purpose, and is made on a declaration, by the assured, that they believe the statements of the "life" and the referees to be true, the "life" and the referees are still the agents of the assured in the manner contended for. In the first place it seems rather strange, if they are employed, not in any respect to negotiate or to effect the insurance, but only to give information as to facts exclusively known to themselves, they should be denominated *agents*. It often happens that the assured have never seen the "life," and are wholly unacquainted with the state of his health and with his habits. But an agent is supposed to do what could be done by the principal, were the principal present. A more serious objection arises from the consideration that this doctrine would entirely prevent a life policy from being a security on which a man could safely rely as a provision for his family, however honestly and however prudently he may have acted when the policy was effected. But, the assurer and assured being equally ignorant of material facts to influence their contract, if the assurer asks for information, and the assured does his best to put the assurer in a situation to obtain the information, and to form his own opinion as to whether the information is sincere, can it be per-

mitted, where the assurer, without any blame being imputable to the *270] assured, has allowed himself to be *deceived, that he shall be able to say to the assured, "you warranted all the information I receive to be true; and, having received your premiums for many years, now the life drops, I tell you I was incautious, and the policy I gave you is a nullity." The uberrima fides is to be observed with respect to life insurances as well as marine insurances. The assured is always bound, not only to make a true answer to the questions put to him, but spontaneously to disclose any fact exclusively within his knowledge which it is material for the assurer to know; and any fraud by an agent employed to effect the insurance is the fraud of the principal: but there is no analogy between the statements of the "life" or the referees in the negotiation of a life insurance and the statements of an insurance broker to underwriters, by which he induces them to subscribe the policy.

I must now examine the authorities on which the defendants' counsel rely. The earliest is *Fitzherbert v. Mather*, 1 T. R. 12. But that was a marine insurance; the agency of the person who made the representation was admitted; and Lord Mansfield said: "This policy was effected by misrepresentation: and that misrepresentation arose from the proper agent of the plaintiff, who gave the intelligence. Now whether this happened from fraud or negligence, it makes no difference; for in either case the policy is void." As to *Cornfoot v. Fowke*, 6 M. & W. 358,† which was brought before us to illustrate the liability of a principal for his agent, I am not called upon to say, whether that case was well decided by the majority of the judges in the Exchequer, although the voice of Westminster Hall was, I believe, rather in favour of the *271] *dissentient Chief Baron. But there the agency was not disputed; and therefore the decision cannot assist us in deciding whether the "life" and the referees were agents or not. *Morrison v. Muspratt*, 4 Bing. 60 (E. C. L. R. vol. 13), comes much nearer the point: but it can have little weight as to the question we have now to determine; for this question was never mooted at the bar or by the Judges; the policy is not set out in the report; and the Court merely granted a new trial that the jury might consider whether there had been any misrepresentation. So in *Maynard v. Rhodes*, 5 Dowl. & R. 266 (E. C. L. R. vol. 16), the policy is not set out; the "life" was considered the agent to effect the policy, which cannot be pretended here; it was regarded as a conditional policy; and therefore the untrue representation by the "life" of a fact of which the assured was not cognisant was taken to have been incorporated in the policy. *Lindenau v. Desborough*, 8 B. & C. 586 (E. C. L. R. vol. 15), turned upon the concealment of a material fact within the knowledge of the assured, viz., that from paralysis the life of the Duke of Saxe Gotha was uninsurable. Lord Tenterden said, in giving judgment in banc, that he directed "the jury to find for the defendant if they thought the plaintiff had failed to communicate to the insurers any material circumstance within his knowledge." He adds that he thought his direction correct, and that the circumstances proved as to the state of the Duke of Saxe Gotha's mental faculties were material. Bayley, J., gave this as the reason of his decision: "that in all cases of insurance, whether on ships, houses, or lives, the underwriters should be informed of every material circumstance *within the knowledge of the assured*." Little-
 dale,

J., concurred for the *same reason: "It is the duty of the assured in all cases to disclose all material facts *within their knowledge*." [*272] The case chiefly relied upon by the defendants' counsel was *Everett v. Desborough*, 5 Bing. 503 (E. C. L. R. vol. 15): and the marginal note certainly does lay down, in the most general and unqualified terms, that "In an insurance upon the life of another, the life insured, if applied to for information, is, in giving such information, impliedly the agent of the party insuring, who is bound by his statements, and must suffer if they are false, although he is unacquainted with the life insured." But that was an Atlas policy containing the clause or condition to which I before alluded as sufficient to create a contract whereby the assured expressly takes upon himself to guaranty the truth of what the "life" or the referees have said, and to agree that the policy shall be void if they have misrepresented any material fact. The language of Best, C. J., Park, J., Burrough, J., and Gaselee, J., must be taken in reference to this clause or condition: and, if they could be supposed to have overlooked it, the authority of their decision cannot be considered very high. In *Huckman v. Fernie*, 3 M. & W. 505,† a distinction is taken between the "life" being the general agent of the assured, or the agent for giving true answers to questions put; but nothing is laid down to strengthen the doctrine that, where the policy is in the form of that upon which we have to decide, the assured, acting with good faith, can be prejudiced by what is said or concealed by the "life" or the referees. In *Swete v. Fairlie*, 6 Car. & P. 1 (E. C. L. R. vol. 25), the question was upon the materiality of the representation or concealment. *Rawlins v. Desborough*, 2 Moo. & R. 329, was likewise referred to; but *that was an action on an Atlas policy containing, I presume, the usual clause or condi- [*273] tion: and the case mainly turned upon whether a letter had been communicated to the assured before the policy was effected, and whether the circumstances stated in it were material to be communicated to the defendants. An able note is added by the reporters, in which they point out the importance of the clause "that a declaration as to all the above points is to be considered as the basis of the contract; and that if such declaration be not in all respects true, the policy will become void." They do likewise observe that the cases support the doctrine that the *life* "is only the agent of the assured for the purpose of answering such questions as shall be put to him by the insurers." In *Smith's Compendium of Mercantile Law*, p. 395 (5th ed.), the same distinction is taken: but there the very learned author (whose early death is deeply to be lamented) lays down what I consider the sound doctrine, that, "if there be no warranty or condition on the part of the insured, the insurer is subject to all risks, unless he can show a fraudulent concealment or misrepresentation, or a non-communication of material facts known to the assured, either of which will avoid the policy." In the present case the plaintiffs were neither guilty of misrepresentation nor of fraudulent concealment; and, instead of warranting the truth of the statement made by the "life" and the referees, they cautiously say only that they "*believe*" these statements to be true, according to the printed form supplied by the defendants themselves. An ungracious attempt was made to deprive the plaintiffs of the benefit of this declaration in the proposal because it bears date the 8th of September, whereas the

*274] defendants had agreed to take the risk on *the 7th: but the policy is dated the 8th, and expressly refers to the declaration, which it must have been well understood between the parties was to be the basis of the insurance. I consider it unnecessary to give any weight to the circumstance that Spackman was actually employed and paid by the office, as, irrespective of that circumstance, I think that the plaintiffs, who believed his statements to be true, cannot be answerable for any misrepresentation or fraudulent concealment of which he might be guilty. For these reasons I hold that the verdict found for the plaintiffs on the first three pleas ought not to be disturbed.

The next question which arises is, whether the fourth plea is upon the face of it sufficient in point of law. The declaration having set out the policy, which recited that the plaintiffs had caused to be delivered into the office of the association a proposal for assurance, "whereby it was declared that the said R. P. Jodrell had not had any fit or convulsions since childhood, nor any disease of the lungs or heart, or any other disease or disorder tending to the shortening of life," the fourth plea alleges that the said declaration in the said policy, and in the declaration in this cause mentioned, that the said R. P. Jodrell had not any fit or convulsion since childhood, and that he had not any disease of the lungs or heart, or any other disease or disorder tending to the shortening of life, was not true; but, on the contrary, the said R. P. Jodrell, "since childhood, and before making of the said declaration in the said policy mentioned, had fits, to wit, epileptic fits, and that, before the making of the said declaration, the said R. P. Jodrell had had a disease or disorder tending to the shortening of life, to wit, delirium tremens." In judging of the sufficiency of this *plea we can

*275] only look to the record; and we are bound to suppose that the plaintiff's declaration on which the insurance was effected contained a positive allegation amounting to a warranty as to the health of Mr. Jodrell; and here the actual declaration which only amounted to *belief* can be of no avail to the plaintiffs. It seems to follow inevitably that the plea which alleges that he had epileptic fits and delirium tremens, however inequitable it may be, sets up a legal bar to the action without the *scienter* or any suggestion of fraud. This shows that the policy never attached, or was void from the beginning, wholly irrespective of fraud on the part of the plaintiffs.

The fourth plea being good in point of law, there was abundant evidence to support it; for witnesses of undoubted credit clearly proved that Mr. Jodrell had been afflicted with epileptic fits and with delirium tremens. Regard being had to the terms of this issue, the jury were not at liberty to look to the true terms of the declaration which the plaintiffs had actually made as to their *belief*; and the Judge was bound to direct a verdict upon it to be entered for the defendants.

I now come to the equitable replication to the fourth plea, that the plaintiffs had been induced to effect the policy with The Westminster Life Insurance Company in consequence of their undertaking that all assurances with their Association "should be unquestionable, except when fraud might be practised in obtaining them;" and that no fraud had been practised by the plaintiffs in obtaining this policy.

I must first observe that, although the fourth plea is good in point of law, it is undoubtedly a fraudulent plea; for it evades imputing any

fraud to the plaintiffs, as was done by the first three pleas which were found in their *favour; it seeks to take advantage of the untrue recital in the policy which was the deed poll of the Company; [*276 and it deprives the plaintiffs of the benefit of the declaration which they had really made according to the printed form supplied to them by the defendants, We "do hereby declare that we *believe* the above particulars and statements are true."

According to the case of *Wood v. Dwarries*, 11 Exch. 493,† the equitable replication would be sufficient without the special fraud thus imputable to the fourth plea; and we ought to be bound by that decision, even if we doubted the propriety of it: but I must say that I most heartily concur in it. A prospectus issued by the authority of the insurance Company is not like a parol observation of an officer of the Company during the negotiation, but is a solemn undertaking on the part of the Company: and, if the policy really is entered into on the faith of the prospectus, I think that in equity the prospectus, although not expressly referred to in the policy, is so far to be considered a part of the contract, that equity ought not to allow a defence to be set up against an undertaking in the prospectus, on the faith of which the policy was effected.

The next question to be considered is, whether there was evidence to go to the jury in support of the replication? This is the question which was reserved, and on which the rule to enter a verdict for the defendant on this replication depended. If the Judge at the trial ought to have directed a verdict for the defendants on this issue, without leaving anything to the jury upon it, this part of the rule ought to be made absolute, but not otherwise. Now, while I allow that a mere scintilla of [*277 *evidence is not sufficient, I am of opinion that there was evidence upon which the jury might reasonably have come to the conclusion at which they arrived; that the plaintiffs were aware of the prospectus, and were induced to effect the policy with the defendants' Company in consequence of the undertaking which the prospectus contained, that all assurances by the Company should be unquestionable, except for fraud. Upon a notice to produce the prospectus mentioned in the replication, a copy of the prospectus was produced by the defendants: and it was admitted that this was the prospectus of The Westminster Life Insurance Company, and that it was generally circulated by the authority of the Company before and at the time when the policy sued upon was effected. The fair effect of this admission is, that the prospectus produced was the only prospectus which was then issued by the Company, and that it was an undertaking by which they invited customers to come to their office, and to effect policies with them. What seems to me an important circumstance is, that the prospectus is addressed to all customers, and that it applies to "all assurances" with the defendants' Association, "except where fraud has been practised in obtaining them." Had the undertaking been only as to a particular class of policies, or on payment of a varying rate of premium, or on any other condition, much stronger evidence might reasonably be required that a particular policy was effected on the footing of this undertaking, than where the undertaking is absolute and universal.

We were truly told that, in considering this question, we ought to inquire upon what evidence a Court of equity would interfere in such a

case. But I am of opinion that the numerous decisions cited, in which
 *278] Courts of equity have been called upon to interfere by *reforming a written instrument, on the ground that a mistake has been made in drawing it up, have little or no bearing on this question. The application to a Court of equity in such a case as the present would not be under its jurisdiction to *correct mistakes*, and to decree that a written document shall be reformed. If, instead of this equitable replication, a bill had been filed for relief in a Court of equity, the foundation of it would have been the *fraud* of the defendants in pleading the 4th plea, contrary to the undertaking contained in their prospectus; and the prayer of the bill would have been, not that the policy should be reformed, but that the defendants should be enjoined against fraudulently setting up a defence which would prevail at law. This was the view taken by the Court of Exchequer of the effect of such a prospectus in *Wood v. Dwaris*, 11 Exch. 493:† and Mr. *Cairns*, in the course of his able argument, candidly admitted that an application to a Court of equity, for an injunction on the ground of fraud, would be the proper remedy. I therefore do not think it necessary to travel through the various authorities cited, in which, where a party to a written contract, which he has signed, insisting that by mistake it was written in terms contrary to a previous agreement intended to be embodied in it, Lord Eldon, and other English Judges of great name, have said they would not interfere except upon the fullest, clearest, and most irrefragable evidence. Nor is the American case, (a) cited from 2 Johnson, in point, as that appears only to have laid down the well-known rule, that parol evidence is not to be admitted at law to contradict a written contract.
 *279] Here there is no improbability to be encountered, that, *according to the plaintiffs' case, the written document would have been in a different form; and the plaintiffs seek relief without alleging any mistake in the form of a written instrument contrary to the intention of either party.

Was the Judge at the trial wrong in leaving the issue on the equitable replication to the jury, and telling them that, from the circulation of the prospectus in the manner admitted and the execution of the policy, they might, if they were so convinced, without express evidence to that effect, find that the plaintiffs had seen the prospectus, and were induced by it to effect the policy with the defendants? From two facts being established by express evidence, an intervening fact may be presumed. If a strong probability is raised by express evidence, unless the probable consequence may be inferred, the business of life could not be conducted, and justice could not be administered. In Greenleaf's excellent *Treatise On the Law of Evidence*, part 1, ch. iv., the subject of "presumptive evidence" is very copiously and accurately discussed; and various illustrations are given of the legitimate power of juries to infer specific facts of which no express evidence is given from other facts which are expressly proved. In the present case the jury were by no means bound to infer that the plaintiffs saw the prospectus and were influenced by it. But I think the jury might not unreasonably infer that, according to the course of business, copies of the prospectus were given to customers coming to the defendants' place of business, and were posted up in their office so as to be seen by all who dealt with

(a) *Lynam v. United Insurance Company*, 2 Johnson's Ch. R. (New York) 630.

them, the object of the defendants evidently being that the prospectus should be known as generally as possible. Suppose it had been [*280] proved or admitted at the trial that, over the outer door of the house in which the business of the defendants is conducted, there had been the words in large letters, *All policies effected with this association shall be unquestionable unless obtained by fraud*, and that there was a similar notice on the walls of the room in which the policy in question was executed and delivered to the plaintiffs, would it have been necessary for the plaintiffs to give evidence that they had actually seen and read the notice? Might not the jury equally infer that the prospectus generally circulated according to the admission was seen and read by the plaintiffs?

If they saw and read the prospectus, the next inference would almost be inevitable, that the plaintiffs were induced to effect the policy with the defendants by the encouraging allegation that it would be unquestionable if they practised no fraud in obtaining it. Strong observations were made at the bar upon the circumstance that the officers of the plaintiffs' company were examined as witnesses at the trial, and that no question was asked them, on either side, as to their having seen the prospectus, or been influenced by it to insure with the defendants; but this, although very fit to be commented upon to the jury, cannot vary the abstract question of law, whether it be necessary to adduce express evidence that the assured saw the prospectus and gave faith to it. I may here observe that, until the recent statutes admitting the evidence of the parties and of interested witnesses, it must have been almost impossible to give express evidence that the assured actually saw the prospectus and were thereby induced to effect the policy. Yet it can hardly be argued that these statutes altered any rule as to what was evidence of a fact to be submitted to a jury, although *they may [*281] afford topics to an advocate in addressing a jury as to the conclusions they may draw from the evidence submitted to them. The defendants' counsel insisted that such express evidence would at all events be necessary in a Court of equity upon an application for an injunction: but no authority was cited to support the proposition; and, as to what shall be reasonable evidence of a matter of fact, we conceive that equity would be disposed to follow the rules of law. If the equity Judge felt serious doubts upon the subject he might direct an issue; and this would be the identical issue tried upon the replication we are now considering. Reliance was placed upon the observation of the Court of Exchequer in *Wood v. Dwarries*, 11 Exch. 493,† that the replication there should have been traversed: but this can only mean that the jury must be convinced that the prospectus had been seen and acted upon; and no rule was laid down with respect to the evidence necessary to authorize such a finding. Indeed, one of the Judges there seems to have thought the presumption, from the circulation of the prospectus, so strong that it would be incumbent on the defendants to rebut it by proving that the policy sued upon was negotiated on a different footing. Alderson, B., says that the issuing of the prospectus "was holding out to all the world that they would require no proof of the truth of the matters stated in the proposal, but would only dispute the claim on the ground of fraud." Martin, B., says, "the plaintiff is bound to prove, not only that such a prospectus was issued, but also that the policy was made on

the terms of that prospectus." The learned Judge, however, seems to me only to mean that some evidence is to be given from *which *282] the jury would draw that inference, without saying that the general circulation of such a prospectus would not be sufficient for that purpose; and he goes on to suggest that the Company should expressly prove what they stated in their rejoinder, that the policy was not made on the terms of the prospectus, but was expressly made on different terms, and so entitle themselves to a verdict.

The counsel for the defendants argued that they were entitled to succeed, because it was consistent with the evidence that the policy was effected without reference to the prospectus; but may not juries judge of probabilities where a foundation is laid from which a reasonable inference may be drawn?

Assuming that, according to the finding of the jury, the prospectus was seen and acted upon by the plaintiffs, we have now only to consider what construction is to be put upon it. After stating the foundation of the office in 1717, it thus proceeds: "The successful operation of the Association in its immediate circle of influence has been such as to determine the directors to enlarge its sphere of usefulness, and to advance, to the utmost of their power, so beneficial a cause as that of life assurance, and, with a view that their Association shall present to the assurer every privilege and advantage which practice has shown to be consistent with the safety of the Society, a thorough revision has been made of the conditions upon which assurances are granted, and every restriction which experience has shown not to be absolutely necessary to be retained has been withdrawn, so that all assurances with the Association shall be unquestionable, except where fraud has been practised in obtaining them." What did the defendants mean that those *283] who *read their language should understand by it? They now say that their meaning was that the assurances should be questionable if any fraud was practised by others in the course of the transaction, although the assured should be free from all suspicion of fraud, so that the present policy shall be void by the fraud of Jodrell, Spackman, and Brade in answering the questions put to them, neither fraud nor negligence being imputable to the plaintiffs themselves. But would the defendants' Association thereby "enlarge its sphere of usefulness," and "advance, to the utmost of their power, the beneficial cause of life assurance?" On the contrary, they would render a life policy of little value, by exposing it to the peril of being declared void by reason of the fraud of parties over whom the assured have no control. But the prospectus goes on and declares, in the most unqualified terms, that "all assurances with the Association *shall be unquestionable*," that is, *indisputable*, and shall afford a certain security to the assured: this would be an absolute guarantee that no objection shall be taken to defeat the policy on the death of the party whose life is insured, subject to the implied exception of personal fraud which will vitiate every contract. Then, what effect is to be given to the positive exception? It seems to me to be only the expression of what otherwise would have been implied, that, if the assured have themselves been guilty of fraud in obtaining the policy, they cannot render it available. The narrower construction contended for would make the prospectus a delusion and a snare. The public would be led to believe that any policy effected with this Company

would be perfectly safe and secure, if the party who effected it acted with perfect good faith; whereas the policy would be *questionable and rendered null by a discovery that the person whose life is insured, or either of the referees, without the privity of the assured, has misstated any one material fact. I cannot believe that the defendants issued the prospectus with any such a mental reservation: and, if they did, I think we ought not to be guided by the construction they meant themselves to put upon it, but by the construction they intended should be put upon it by those with whom they dealt. [*284]

Although, in considering the validity of the 4th plea, we could not take into consideration the true terms of the plaintiffs' declaration in the proposal, this is quite open to us upon the equitable replication; and, in construing the prospectus, we may well look to that form of declaration, and recollect that it is supplied in a printed shape by the defendants themselves, making their prospectus, and the declaration which they require, entirely to harmonize. Some insurance offices (as they have a right to do) require a declaration amounting to a guarantee that all the answers of the life and of the referees are true; and they issue no prospectus about their assurances being unquestionable or indisputable. The defendants, when they issued their prospectus, appear at the same time very properly to have varied the usual form of the declaration, and to have proclaimed that they would be contented with the *belief* of the assured in the statements of the "life" and the referees, making the test of the validity of the policy the good faith of the assured. How can they afterwards torture *belief* into a guarantee of the absolute verity of all the statements of the "life" and the referees, and, admitting that the assured are free from all taint of fraud, still seek to invalidate the policy?

*I am of opinion that the verdict for the plaintiffs on the equitable replication ought not to be disturbed. But, my learned Brothers differing with me on this point, the result of the whole is, that the verdict will stand for the plaintiffs on the first three pleas, and for the defendants on the fourth plea and on the equitable replication. [*285]

Judgment accordingly.

IN THE EXCHEQUER CHAMBER.

[May 5, 1858.]

NOTICE of appeal against this decision was given by the plaintiffs. The case, on which the appeal was brought, stated the facts in substance as above, p. 238.(a)

The appeal was argued in the Exchequer Chamber in Easter Term, 1858.(b)

Macnamara (in the absence of the Attorney-General) was called upon to argue.—The questions are upon the rule to enter the verdict, and

(a) It will be observed that this statement differs in some respects, apparently not affecting the decision of the case, from that in the judgment given by Lord Campbell, C. J., in the Court below.

(b) Monday, May 3d, 1858, and the two days next following.

also on the motion for judgment non obstante veredicto on the ground of the badness of the fourth plea. [WILLES, J.—This is an appeal under The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 34. If the judgment on the verdict is entered for the wrong party, that is matter of error: and, though it might be brought before this Court, it must be brought in a different manner. There would have been no objection to hearing the appeal and the matter of error at the same time, *286] if the suggestion of error *(substituted by The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 1), sect. 152, for the writ of error) had been entered on the record.]

By consent of both parties, and by order of the Court, suggestions of error by both parties were now entered on the record.

Macnamara, for the party suggesting error (plaintiffs below).—First, the 4th plea is bad. It does not allege any fraud of the plaintiffs, or knowledge by them that the statement was not true; and it can be supported only on the ground that there was a warranty of the accuracy of the statement. But on this record there is no such warranty. The count states that in the policy, which was the defendants' deed poll, it was recited that a proposal in writing, containing certain declarations, had been delivered by the plaintiffs. The 4th plea treats this as if, in the count, there were an averment that there actually was such a proposal, or as if the recital in the deed poll, which is the language of the defendants only, bound both parties. But, even if it were to be taken that there was such a proposal, it is not a necessary consequence that the insured warranted the accuracy of every statement in it: *Benham v. United Guarantie and Life Assurance Company*, 7 Exch. 744.† It is quite possible to frame a policy making the accuracy of any statement a condition precedent to the validity of the policy. That was successfully done in *Anderson v. Fitzgerald*, 4 H. L. Ca. 484. But, unless it is so framed, the insurance is not avoided if the assured makes a full bonâ fide statement of all he knows: *Stackpole v. Simon*, Park On Insurance, 932 (8th ed.). It is a question of construction, in every case, *287] whether a policy is so worded *as to make the accuracy of a bonâ fide statement a condition precedent; and the rules of construction are the same in policies as in other written contracts: *Robertson v. French*, 4 East 130, 135. The doctrine is powerfully enforced by *Smith, B.* (differing from the rest of the Irish Court of Exchequer), in *Abbott v. Howard, Hayes* (Irish Exch. Rep.), 381, 401. In this policy the common form of agreeing that the statement is the basis of the contract is not followed. It is recited that "thereupon" the Association undertook the assurance; but that means after it, not upon it as the basis of the contract. The phraseology seems selected for the purpose of showing that it is not to be a warranty, but is to be a representation. It may be quite true that the assured is not to conceal or misstate any material fact known to him; but this plea alleges neither that the fact was material, nor that it was known to the assured.

Sir *F. Kelly*, Attorney-General, who had been absent, was permitted by the Court to argue the other points.—The plaintiffs are entitled to the verdict on the 4th plea. The statement proved to have been made was that the plaintiffs believed the assertions that Jodrell never had fits, &c.: and that statement was literally true. [MARTIN, B.—The plea is, that the statement in the policy and in the declaration mentioned, that

Jodrell had not had any fit, &c., was not true; but, on the contrary, Jodrell had fits. That was proved: whether it is a good plea or not is another question.] It may be that the defendants thought that they were entitled without being guilty of fraud, to mould this qualified statement of the plaintiffs into something more like the usual positive statement, when they recited it in their policy. But, *whether that [*288 be so or not, the statement is clearly misrecited there: if by mistake, then the plaintiffs ought not to be prejudiced; if fraudulently, of course the defendants cannot avail themselves of it. If the policy recite only a portion of the statement, the Court is entitled to look at the whole of such statement in construing the policy. *Sceales v. Scanlan*, 6 Ir. Law Rep. 367, establishes that principle. [BRAMWELL, B.—The plea says merely that the statement in the policy and declaration mentioned, namely that Jodrell had not had fits, &c., is untrue. Can we travel out of the record?] At all events, the plaintiffs are entitled to judgment non obstante veredicto upon that issue. Unless we are bound to assume that the plea implies an allegation that the statement was made by the plaintiffs, and was the basis of the policy, the plea raises an issue which is immaterial. Now the plaintiffs are clearly no parties to a mere recital in the deed poll of the defendants. And, if the accuracy of the statement was to be the basis of the policy, the policy should have contained a stipulation to that effect. It is said that the plaintiffs accepted the contract as made. [CROWDER, J.—“Thereupon.”] That means, immediately, in point of time. But they are entitled to rely on a misrecital in that contract, even though they have taken the benefit of the instrument, if they were not parties to that misrecital: *Edwards v. Brown*, 3 Y. & J. 423.†

Further, the replication to the 4th plea is good, and proved. The jury are the proper judges as to whether the terms of the prospectus did, in effect, enter into the contract. It is said that the prospectus, in point of law, cannot alter the terms of the policy. But *Wood v. Dwaris*, 11 Exch. 493,† *is an authority to show that a replication [*289 in this form is now good.

Bovill, for the defendants.—First, with respect to the 4th plea. As to the argument that the statement is misrecited in the policy, the real document, upon the faith of which the assurance was granted, was the proposal: and that amounts to a positive declaration by Norris, the agent of the plaintiffs. But that point is not material; the question for the Court, as to the 4th plea, is whether, as it stands, it is good in law. [BRAMWELL, B.—There is no doubt it was proved in fact.] Then, is the statement in the policy, mentioned in that plea, and proved to be untrue, a warranty or not? If it be, the contract is at an end. And that such a statement is a warranty is established by numerous authorities. The distinction between a warranty and a mere representation, is laid down in note (1) to *Goram v. Sweeting*, 2 Wms. Saund. 201. [MARTIN, B.—That was a case of a marine policy.] The law is laid down as to policies generally. “A warranty,” it is said, “is a condition or contingency which is inserted in, and makes part of, the policy itself:” “a representation is only a state of the case, and not a part of the written instrument, but collateral to it, and entirely independent of it.” A similar definition of a warranty is given by *Le Blanc, J.*, in *Lothian v. Henderson*, 3 Bos. & P. 499, 515, and by Lord Mansfield in

De Hahn v. Hartley, 1 T. R. 343. And the principle was adopted in *Sceales v. Scanlan*, 6 Ir. L. Rep. 367, which was a case of life assurance, and which is, as regards this question, directly in point. It is not in point as to the question with respect to which it was cited on the *290] *other side, namely, whether the policy here could be construed with reference to the whole of the original statement; for there the defendants had pleaded *Non assumpsit*. But it is in point as showing that a statement like that in the present case amounts to a warranty, and that the untruth of it, whether fraudulent or not, avoids the contract. [MARTIN, B.—In *Sceales v. Scanlan*, 6 Ir. L. Rep. 367, it was provided that the policy should be void if any untrue allegation were contained in the deposited declaration.] That was unnecessary: such a declaration is always, necessarily, the basis of the policy; and, where it is, it amounts to a warranty. The law is laid down by the Court very broadly, and without any reference to that proviso. *Anderson v. Fitzgerald*, 4 H. L. Ca. 484, also shows, though only incidentally, that this distinction between representations and warranties is the same in life policies as in marine policies. [MARTIN, B.—*Stokes v. Cox*, 1 H. & N. 533,(a) a case of a fire policy, seems rather against you.] There the statement, namely, “no steam-engine employed on the premises,” need not necessarily have been the basis of the contract, as here; nor was there anything in the policy itself, as here, tending to show that it was. *Benham v. United Guarantie and Life Assurance Company*, 7 Exch. 744,† is distinguishable upon the same principle. [BRAMWELL, B.—You contend that the truth of the statement here, independently of any question of fraud, is, from its nature, a condition precedent to the liability of the defendants upon the policy?] Yes. In *Glaholm v. Hays*, 2 M. & G. 257 (E. C. L. R. vol. 40), and *Ollive v. Booker*, 1 Exch. *291] 416,† that *principle was adopted, in the construction of statements in charter-parties by the shipowner. [CROWDER, J.—In *Barker v. Windle*, 6 E. & B. 675 (E. C. L. R. vol. 88), the statement, in a charter-party, of the tonnage of a ship was held to be matter of representation only.] There the statement was in very general terms: and it might therefore be fairly presumed that the parties had not intended to make it the basis of the contract. Here the statement is precise, and, from the very nature of the contract, a matter upon the faith of which the assurance was made. It may be contended, on the other side, that, as, at the bottom of this policy, there are express stipulations that under certain circumstances (such as the assured entering the navy or army, &c.) the policy will be avoided, no infringement of any condition not expressly providing for the avoidance of the policy will, in the absence of mala fides, necessarily avoid the policy. But, first, if the statement amounts to a warranty, it would have been unnecessary to provide expressly for the result of a breach of it: and, secondly, the express stipulations in question refer to contingencies not mentioned in the body of the policy, and which, moreover, must occur after the making of it: whereas the untruth of this statement would be a fact existing at the time of the making of the contract itself.

Next, the second plea was proved in fact. [BRAMWELL, B.—It alleges that the statement, that the assured had not had fits, &c., was

(a) In Exch. Ch., reversing the judgment of Exch. in *Stokes v. Cox*, 1 H. & N. 320.†

untrue, and then adds "all which the persons making the said declarations, at the time of making of the same, well knew." Does the fraud of Brade and Spackman, the referees, prove that *allegation?] [*292 That is the question upon which the validity of the plea turns. The Court below, in giving judgment, discussed the question of fraud on the part of the referees principally with reference to the equitable replication. They held, however, that the plea was proved only if the referees were to be considered as the agents of the plaintiffs in effecting the insurance; and that they were not to be so considered. But there are numerous authorities to show that an absolutely fraudulent statement on the part of the life insured or his referees incapacitates the party accrediting such statement, and effecting an assurance on the strength of it, from recovering, although such fraud might not be known to him: *Maynard v. Rhodes*, 5 D. & R. 266 (E. C. L. R. vol. 16); *Everett v. Desborough*, 5 Bing. 503 (E. C. L. R. vol. 15); *Rawlins v. Desborough*, 2 Moo. & R. 328, 334, (a) (see also the note to that case); *Lindenau v. Desborough*, 8 B. & C. 586 (E. C. L. R. vol. 15). [POLLOCK, C. B.—In all those cases, except the first, there was a stipulation that the truth of the statement should be the basis of the contract. WILLES, J.—And there was apparently a similar stipulation in *Maynard v. Rhodes*, 5 D. & R. 266 (E. C. L. R. vol. 16), according to the report in *Carrington & Payne*, 1 C. & P. 360 (E. C. L. R. vol. 12).] The extent of the responsibility of such constructive agent is treated of in *Story on Agency*, s. 127.

Next, the replication is untrue in fact and bad in law. The two points cannot be kept completely separate in arguing either. But, first, as to the facts: it is clear that there was a strong presumption against the plaintiffs having ever seen the prospectus: at all events, it was for the plaintiffs to show that they had seen it, and that the parties had entered into the contract upon the *faith of its contents: [*293 *Shrewsbury v. Blount*, 2 Scott's N. R. 588, S. C. 2 M. & G. 475 (E. C. L. R. vol. 40). [BRAMWELL, B.—*Watson v. Earl Charlemont*, 12 Q. B. 856 (E. C. L. R. vol. 64), is rather against you on that point.] *Atwood v. Small*, 6 Cl. & F. 232, 338, 444, is an authority for the defendants. The analogous decisions as to the effect of a notice by a carrier are collected in Smith's note (1 Smith's Lea. Ca. 175 (4th ed.)) to *Coggs v. Bernard*, 2 Ld. Raym. 909. Now here was no evidence to go to the jury showing that the terms of the prospectus were incorporated in the contract: in fact the policy is, upon the face of it, not on those terms. Secondly, the replication, even if proved, is bad. The plaintiffs endeavour by it, in fact, to set up a wholly different contract from that upon which they declared, by adding to that contract certain fresh terms. Now, the real test of the validity of such a replication is to inquire how a Court of equity (in which capacity this Court now is as regards its decision upon this part of the record) would act upon a similar statement by the plaintiffs. It clearly would not have allowed the policy to be reformed. In order to enable it to do that, the plaintiffs must first have shown either that the contract, as made, was not that which the parties intended to make, or that there had been fraud on the part of the defendants. There is no allegation of either fact in

(a) See S. C. 2 Moo. & R. 70.

the replication: nor was there any evidence of either. The plaintiffs, moreover, in order to have the policy reformed, must have shown what *was* the original contract which they had intended to make, and in what way it differed from the contract declared upon. But the only contract which appears is the very contract declared on, and which the plaintiffs *294] *now seek to have reformed. [BRAMWELL, B.—I doubt if your test be quite accurate: the plaintiffs might not be able, under those circumstances, to go into a Court of equity and ask it to allow the policy to be reformed, and yet the defendants may be equitably estopped, as it were, from questioning the policy. POLLOCK, C. B.—We have now an equitable jurisdiction of our own. I do not see why we may not, in the exercise of that jurisdiction, admit such a replication as this, which sets up, in fact, an agreement between the parties that such a plea as this should not be pleaded.] The replication must, by the statute, be “on equitable grounds:” and therefore the cases in equity are authorities upon either form of equitable jurisdiction. Now, it is clear, from *Collett v. Morrison*, 9 Hare 162, *Shelburne v. Inchiquin*, 1 Br. C. R. 338, *Henkle v. Royal Exchange Assurance Company*, 1 Ves. Sen. 317, *The Marquis Townshend v. Stangroom*, 6 Ves. 328, 333, and other authorities in equity, that the party seeking to have the contract reformed must give strong and irrefragable evidence of what the real contract was intended to be. *Lyman v. United Insurance Company*, 2 Johns. Rep. Ch. (New York) 630, and *Andrews v. Essex Fire and Marine Insurance Company*, 3 Mason’s Rep. (U. S.) 6, are authorities to the same effect. Now here was nothing to show that the parties had intended that the terms of the prospectus should enter into the contract, or even that the plaintiffs had heard of it. *Rees v. Scottish Equitable Assurance Company*, 2 H. & N. 19,† shows that the plaintiffs were not entitled to put in an equitable replication relying on a *295] ground different from that declared upon. If the plaintiffs *chose to enter into a policy containing a warranty, they cannot now seek to qualify their legal liability under such warranty. They have really no equitable right to set up; and the replication therefore ought not to be allowed: *Hunter v. Gibbons*, 1 H. & N. 459.†

Sir *F. Kelly*, Attorney-General, in reply.—[MARTIN, B.—We agree with the judgment of the Court below as to the first three pleas: and we think that the fourth plea was proved in fact. You may therefore confine your argument to the validity of the fourth plea, and the validity and proof of the replication.] First, as to the fourth plea. Even supposing that a mere recital contained in the policy, a deed poll of the defendants, binds the plaintiffs, who do not execute the instrument, it surely cannot have the effect of converting the absolute contract by the defendants to pay a sum of money upon *Jodrell’s* death into a conditional contract, dependent upon the truth of the matter so recited. Further, the record itself does not allege any statement by the plaintiffs. It merely sets out a policy reciting such a statement. The insertion of express conditions, that the policy shall be void under certain circumstances, is a strong argument that it was not the intention of the parties to make the inaccuracy of this statement avoid the policy. [CROWDER, J.—How do you construe “subject to the terms and conditions herein and hereunder expressed?”] That refers to the conditions expressly set out as such, either in the body of the policy or at the end of it. As

to the argument that the statement amounts to a warranty, so that the breach of it avoids the policy, even though there be no express stipulation to that effect, no cases have been brought *forward by the defendants of such a construction of a life policy. Most of the [296 cases cited were cases of marine policies: in the cases of life policies, there was an express provision that the statement was to be the basis of the contract.

Next, as to the replication. [MARTIN, B.—You need not argue upon that, as we are agreed to give judgment for the plaintiffs upon the fourth plea.]

MARTIN, B.—I am of opinion that the fourth plea is bad in substance, and that the plaintiffs are entitled to judgment non obstante veredicto. I do not concur in the argument advanced for the plaintiffs that, in construing the policy, we are to take into consideration that part of the statement delivered into the office which is not recited, or misrecited, in the policy. *Edwards v. Brown*, 3 Y. & J. 423,† is not in point. There the bond was entered into for the purpose of protecting the obligees against the contingency of the obligor's estate turning out anything but a tenancy in tail: and the case does not apply to a contract of insurance, as set out here. Here we can look only at the contract as set out on the record: and, upon that record, it does not appear that the accuracy of the statement with respect to Jodrell's state of health was a condition precedent to the liability of the defendants upon the policy. The policy recites that the plaintiffs had caused to be delivered to the defendants a proposal for insurance which contained certain statements of fact; and, further, that the defendants undertook the policy subject to the terms and conditions *therein* and *thereunder* expressed. What, then, are those conditions? The policy itself states what are the conditions *in* the policy, such, *for instance, as the liability of the funds of the [297 Company; and then, at the foot, follow the conditions *thereunder* written. Upon the record, therefore, it does not appear that any stipulation was, as usual, introduced, that the statement in question should be the basis of the contract. That being so, is the accuracy of such statement, of itself, a condition precedent and essential to the contract? *Stokes v. Cox*, 1 H. & N. 533,†(a) shows that, in the absence of any express stipulation to that effect, such statement should, upon the face of the instrument, clearly and precisely show that it was the intention of the contracting parties to make the accuracy of it a condition precedent. But in the present case, on the contrary, the statement appears to me, upon the face of it, to be matter of representation only. Even if it could be construed as a warranty, it would be a warranty by one party as to part of the consideration only, and the breach of it would be no defence to an action against the other party for the breach of the contract, in the absence of an express stipulation to that effect. It is quite consistent with the record that Jodrell may have died from some ordinary cause; so that there is nothing to show that the defendants were really injured by the fact of the representation being untrue. The cases cited for the defendants, to show that the representation, whether fraudulent or not, if merely untrue, avoided the contract, failed to show that such a rule applied to life policies, unless the policy contained a direct provision that the truth of such representation was to be the basis of the

(a) In Exch. Ch., reversing the judgment of Exch. in *Stokes v. Cox*, 1 H. & N. 320.†

policy. With respect to the rest of the record, we agree with the judgment of the Court below. The *plaintiffs are, therefore, upon the
*298] fourth plea, entitled to judgment non obstante veredicto.

CROWDER, J.—I am of the same opinion. In judging of this plea, as an answer to the declaration, we must look to the declaration itself, and the policy there recited. The policy itself recites that the plaintiffs had delivered in a proposal for insurance, containing certain statements, and that the defendants undertook the proposed insurance subject to the terms and conditions therein and thereunder expressed. The defendants contend that one of those conditions was that, if the statement by the plaintiffs were untrue, the policy should be avoided. But the cases on which they relied were principally cases of marine policies; and none of the cases established that life policies are to be so construed unless they contain an express condition to that effect. Here there is no such express condition: and we can give a reasonable interpretation to the policy without resorting to such a construction. We cannot strike out, as a nullity, the statement recited in the policy; but we may fairly consider it as a representation in writing, the untruth of which would avoid the policy, if the representation were false to the knowledge of the party claiming under the insurance, but not otherwise. It is clearly not a condition; and the words “the terms and conditions herein and hereunder expressed” obviously refer only to those conditions which are actually set out in so many words. The plea, therefore, is bad.

WILLES, J.—The policy in question is a contract by the defendants to pay a sum of money upon a certain event. That contract they are
*299] bound to perform, unless *some fraud has been committed by the plaintiffs upon the office, or the conditions of the policy have not been fulfilled. There was clearly no fraud. Were, then, the conditions fulfilled? The defendants contend that they were not, because the statement made by the plaintiffs in their proposal of insurance was untrue in fact. I guard myself from saying that it would be impossible to introduce upon the record the statement really made by the plaintiffs, namely, a statement founded on their belief only. At all events, looking only at the record as it stands, there is nothing in law to make the truth of the statement a condition precedent to the liability of the defendants upon the policy: unless it were untrue to the knowledge of the plaintiffs, and therefore fraudulent, the mere untruth of it would not avoid any policy in which it was introduced, the policy containing no express stipulation to that effect. Here is no such stipulation. The mere recital of such a statement in the policy would not alter the general law, or convert such statement from a mere matter of representation into a condition precedent. The documents brought before us upon this appeal are not strictly in evidence: but it is clear from them, and it is satisfactory to us to know, that our decision is in accordance with what was obviously the real intention of the parties.

BRAMWELL, B.—I am also of opinion that the fourth plea is bad in substance. It amounts merely to this, that it is not true that Jodrell had never had fits, &c. In my opinion that plea was proved in fact; but it is bad in law, because the existence of the fact which it traverses is immaterial. The truth of the statement by the plaintiffs is not a
*300] condition precedent to the liability *of the defendants upon the policy. It is clearly not a condition precedent in terms; and I

agree with my brother Martin that, in the absence of any express stipulation in the instrument containing such statement, making the truth of it a condition precedent, we ought not to adopt that construction except upon very clear indications that it was the intention of the contracting parties that the statement should have that effect. In some cases, as, for instance, in *Ollive v. Booker*, 1 Exch. 416,† the very nature of the contract necessarily makes the accuracy of the statement a condition precedent; but, as Parke, B., observed in giving judgment in that case, the rule depends upon each particular contract. We cannot rely on usage; nor ought any rule to be drawn from the cases cited as to the construction of marine policies. The effect of each contract must be determined by the instrument itself: and there is nothing in this policy to make us construe the statement in question as a condition precedent. In the first place, there is no express stipulation to that effect. It has been argued, for the defendants, that the truth of the statement must necessarily be the basis of the contract. But I see nothing unreasonable in the defendants giving, or the plaintiffs accepting, a policy not so based: at all events, if the statement was intended to be the basis of the contract, the proper plan would have been to insert in the policy an express condition to that effect. The defendants also rely on the averment that the defendants “thereupon” accepted the insurance. But I take “thereupon” to mean, on the proposal being made; and, even if it mean, on the declaration being made by *the plaintiffs, I think [*301 we may fairly construe it as meaning merely on their declaring their belief of the truth of the matter in question. Reliance was also placed by the defendants on the words “subject to the terms and conditions herein and hereunder expressed.” But “herein” clearly refers to the conditions expressly set out in the body of the policy, and “hereunder” to those expressly set out at the foot of it; and, on the principle that *Expressum facit cessare tacitum*, I think the introduction of these words is an argument against the inference, by implication, of any condition not expressly inserted. The Court below held that the statement, as recited in the policy (and we can look only at the record, irrespective of any misrecital), amounted to a warranty: and at first I was disposed to take the same view, and to hold that the parties had inserted the statement for the purpose of clearly defining what their contract was. But, upon consideration, I think we may, with perfect consistency, give it the construction which I now put upon it.

My Brothers have not adverted to the question raised as to the proof of the other three pleas. I have no doubt at all as to this point. Fraud on the part of the person effecting the assurance, or of his agent, of course avoids the policy; but I cannot see how the mere fraud of some third party can have that effect, unless there be an express condition between the contracting parties to that effect. It was contended for the defendants that Jodrell was to be considered as an agent. But who was his principal? As far as he could be considered an agent, he was as much the defendants’ agent as the plaintiffs’: his information was equally material to either. Therefore, as it must be taken that the fraud alleged in *the pleas is fraud for which the plaintiffs are [*302 responsible, it is clear that the pleas were not proved.

CHANNELL, B.—I had some doubts, during the argument, with respect to the questions raised upon the fourth plea: but I am now clearly of

opinion that it was proved in fact, but that it is bad in law. My reasons are the same as those which have already been given by my Brothers; but, as our judgment differs from that of the Court below, it is proper that I should state them.

Some confusion appears to me to have been introduced, during the argument, in the use of the word "warranty." The breach of a warranty does not avoid the contract, unless the warranty amounts to a condition. Now, even assuming the statement here to amount to a warranty, is it a warranty in the nature of a condition? It may be so, no doubt, without any express stipulation to that effect; but I agree that we ought not so to construe it unless the nature of the contract affords a strong presumption that the parties intended to give the statement that effect. Here there is no ground for such presumption. The statement appears to me to be clearly a matter of representation, and not a condition: and therefore, according to the rule laid down by Lord St. Leonards in *Anderson v. Fitzgerald*, 4 H. L. Ca. 484, with which I entirely concur, the fact of its being untrue does not avoid the policy. The argument raised by the defendants upon the words "the terms and conditions herein and hereunder expressed," has been already answered by my Brothers.

The fourth plea, therefore, is bad; and the plaintiffs are entitled to judgment non obstante veredicto on that issue.

*308] *MARTIN, B.—I am authorized by the Lord Chief Baron to state, in his absence, that he concurs with the rest of the Court.(a)
Appeal dismissed, without costs; judgment reversed; and judgment non obstante veredicto for the plaintiffs on the fourth plea.(b)

(a) Besides the judges mentioned in the text, Byles, J., was present at the argument on May 3d, and Williams, J., at that on May 4th.

(b) The case in the Exchequer Chamber is reported by Francis Ellis, Esq.

FRAZER v. JORDAN. July 4.

Action by holder of a bill of exchange against the drawer. Plea: that plaintiff, after endorsement to him by defendant, and while holder, and without defendant's consent, agreed with K. to give time to the acceptor, in consideration that K. would see the bill paid: and that plaintiff gave time accordingly: whereby plaintiff discharged defendant from payment. K. was not alleged to be a party to the bill.

Held, that the plea was bad, inasmuch as the agreement to give time, not being with the principal debtor, but with a stranger, no party to the bill, did not discharge the defendant as surety.

ACTION by the plaintiff, as endorsee, against the defendant, as drawer and endorser of a bill of exchange. Plea: that, after the endorsement of the said bill to the plaintiff, and after the bill had become due, and whilst the plaintiff was the holder, he, without the consent and against the will of the defendant, agreed with Messrs. Kerin & Co., that, in consideration that K. & Co. would bind themselves to see the said bill paid to the plaintiff, the plaintiff would give time to the acceptor of the bill, and would forbear to sue the acceptor of the said bill for the space of ten days: that K. & Co. did, in accordance with the agreement, bind

themselves, &c.; and plaintiff did give time, &c.: and that the said agreement and its performance by the plaintiff and the said K. & Co. were without the defendant's consent and against his will: and that plaintiff thereby discharged the defendant from the payment of the said bill.

*A case was stated by consent, the questions for the Court being: first, whether the plea was made out; and, secondly, if [*304 so, whether the plaintiff was entitled to recover. It is not necessary to set out the case, as the Court held that the plea was proved by the facts.

Atherton, for the plaintiff.—First, the facts of the case, as stated, do not support the plea. (The argument upon this point is omitted.) Secondly, the plea is not good at law. It alleges that the plaintiff, by entering, without defendant's consent, into an agreement with a third party (who was no party to the bill) to give time to the acceptor, discharged the defendant. Now, an agreement between the holder of a bill and a stranger, to give time to the acceptor, does not discharge the other parties to the bill. To have that effect, the agreement to give time must be between the holder and some party to the bill who is prior in order to the party sued; and the reason given by the text books why such agreement discharges the subsequent parties is, that the holder, by giving time, suspends his remedy, to the prejudice of those other parties. But those parties would not be prejudiced if the agreement to give time were made with a third party, a stranger. [ERLE, J.—Is there any case in which the acceptor of the bill was the party to whom time was given? WIGHTMAN, J.—Suppose that here the agreement by the holder had been with both the acceptor and Kerin & Co.? Would that have discharged the defendant?] If it did, it would have discharged him only by virtue of the agreement with the acceptor: the agreement with Kerin & Co. would be superfluous. *Lyon v. Holt*, 5 M. & W. 250,† is an express authority *that the agreement must be [*305 with a party to the bill, in order to discharge the other parties liable upon it. Parke, B., there says: "It is clear, on looking at the plea, that it proceeds on the principle that the discharge of the principal is the discharge of the surety: but if the averment of the endorsement to Holt & Co. were struck out, the plea would be only matter of agreement with a stranger, and no bar." [WIGHTMAN, J.—If the agreement were with the acceptor only, could he have pleaded it during the time of suspension?] He could. [ERLE, J.—In *Ford v. Beech*, In error, 11 Q. B. 852 (E. C. L. R. vol. 68), it was held that the party to whom time was given could not plead the agreement to give time in bar to an action by the holder, although he might have a cross action for the breach of the agreement.] Then, a fortiori, he could not plead an agreement with a mere stranger; and such an agreement, therefore, would not discharge a subsequent party. In *Lyon v. Holt*, 5 M. & W. 250,† it was suggested, during the argument, that, as the agreement was for the acceptor's benefit, his assent to it might be presumed. That suggestion, however, is referred to, with "*sed quære*," in Byles On Bills, 216, note (g) (7th ed.) Here, upon the record, which is all that can be looked at, there is nothing to show that the agreement was with the acceptor's consent.

Hugh Hill, contrâ.—[His argument upon the evidence is omitted.] The plea is good in law. This point has never been expressly decided.

It was decided only incidentally in *Lyon v. Holt*, 5 M. & W. 250.† All that *Ford v. Beech*, 11 Q. B. 852 (E. C. L. R. vol. 63), establishes is, that an agreement by the payee of a promissory note with the maker to *306] suspend suing during a *certain state of circumstances cannot be pleaded in bar by the maker to an action by the payee upon the note. That does not show that other parties to the note are not discharged by such agreement. The mere fact of the suspension, by the party entitled to sue, of his right to sue, is a discharge of the other parties to the instrument. In *Moss v. Hall*, 5 Exch. 46,† Parke, B., in giving judgment, says: "We were referred to the case of *Ford v. Beech*, which decides that an agreement to suspend an action is no answer to it. And that is so; but this is not an agreement to suspend the action against the defendant himself, but it is an agreement to give time to the principal, namely, to suspend the action against him; and whenever a party's hands are effectually tied up, so that he cannot break such an engagement without being made liable for a breach of it, the surety is discharged." These remarks apply exactly to the present case. In *Philpot v. Briant*, 4 Bing. 717 (E. C. L. R. vol. 13), Best, C. J., explains the principle in the same manner. And in *Rees v. Berrington*, 2 Ves. Jun. 540, and the other cases in equity collected in Mr. Tudor's note to that case,(a) the same rule is laid down. [COLERIDGE, J.—All the cases which you have cited in support of your argument presume an agreement with the principal debtor. CROMPTON, J.—What injustice to the surety is there when the agreement is made with a stranger?] It must be conceded that there is no case exactly in point. [COLERIDGE, J.—Do you contend that an agreement with a stranger, a friend of the acceptor, to give time to the latter, is to be construed as an agreement with the acceptor?] There might be some difficulty in going so far; because it *307] is *doubtful what damage such stranger could recover for breach of the agreement, unless he be considered a sort of trustee for the principal debtor.

Atherton, in reply.—The reason given, in the cases cited in support of the plea, why the surety is discharged by the agreement to give time to the principal debtor, does not apply to the present case. The holder here does not make himself liable to a cross action for breach of his agreement: the acceptor cannot bring one; for the agreement was not with him: *Kerin & Co.* cannot; for they are not damnified by the breach. Therefore, according to the test applied by Parke, B., in *Moss v. Hall*, 5 Exch. 46,† the surety is not discharged. In *Ford v. Beech*, 11 Q. B. 852 (E. C. L. R. vol. 63), a cross action might have been maintained; there the agreement was with the principal debtor; and the holder would have been liable to him in damages, though perhaps to no great extent, for the breach of it.

Cur. adv. vult.

COLERIDGE, J., now delivered the judgment of the Court.

This was an action by the endorsee against the drawer of a bill of exchange: and the defendant pleaded that the plaintiff, without the defendant's consent, had entered into an agreement with Messrs. Kerin that they would give time to the acceptor in consideration of Messrs. Kerin promising that they would see the bill paid.

The first question for our consideration, on the special case stated for

our decision, was whether the plea was *proved. This was a question of fact: and we intimated our opinion, during the argument, that that plea was proved by the facts stated. [308]

The remaining question on which we took time to consider was, whether a binding agreement, for a good consideration, with a person who is no party to a bill of exchange, to give time to the acceptor, without the consent of the drawer, discharges the drawer.

It was said, in support of the plea, that the plaintiff had placed himself in such a situation as that he could not sue the acceptor without rendering himself liable to an action for damages. And it was said that the case fell within the doctrine laid down by the Court of Exchequer in the case of *Moss v. Hall*, 5 Exch. 46, 50,† where Parke, B., says: "Whenever a party's hands are effectually tied up, so that he cannot break such an engagement without being made liable for a breach of it, the surety is discharged, the rule being that there must be either a new security given to extend the time, or a binding agreement, upon a sufficient consideration, to suspend the remedy." It was said that the case of *Ford v. Beech*, 11 Q. B. 852 (E. C. L. R. vol. 63), had established that a contract of this nature with the acceptor to suspend proceeding does not constitute a defence to an action, but only gives a cross action for breach of the agreement to give time, and therefore that the exoneration of the surety in such case does not depend on the action against the principal debtor being barred by the agreement; and that the real reason of the discharge is that the party has subjected himself to an action for suing in breach of the agreement; and that this extends to the case of a contract with a stranger *as well as to one with the principal debtor, as the being liable [309] to an action if he sues the debtor will render the creditor less likely to sue the debtor in proper time.

There certainly were authorities from which it has been often supposed that the reason of the discharge of the surety, by an agreement with the principal debtor to give time to him, arose from the right of action against the acceptor being suspended or gone. The doctrine so well established, that a parol agreement, on good consideration, to give time to a bond debtor, does not discharge the bond surety at law, because a parol contract cannot affect a contract under seal, seems founded on this notion; as does also the doctrine of its being necessary that there should be a consideration for the promise to make it binding in point of law, though such consideration would be requisite as well to found an action for damages on the promise, as to raise a defence to the action on the original cause of action. Since the case of *Ford v. Beech*, however, we must take it for granted that agreements of this nature operate only to give a cross action, and do not prevent an action on the original cause of action.

However the doctrine arose, we must consider it quite settled that an agreement, for good consideration, with the principal debtor so far ties up the hands of the creditor who has entered into such an agreement, as that the surety is discharged; and we quite agree with the doctrine of Lord Wensleydale, in *Moss v. Hall*, 5 Exch. 46,† that this remains law, notwithstanding the argument which appears to have been raised in that case, founded on *Ford v. Beech*. The surety has a right at any *time to go to the creditor and say: "I suspect the principal debtor to be insolvent: I will pay you; and I wish you to sue [310]

him." See the observations of Williams, J., in *Strong v. Foster*, 17 Com. B. 201, 219 (E. C. L. R. vol. 84). If, by a binding agreement with the principal debtor, the creditor has agreed not to sue him for a limited time, it would be a breach of faith of which the principal debtor would have a right to complain, if an action were brought against him within the period. And this is held to discharge the surety, although it seems, from *Ford v. Beech*, that he could still do so at the risk of an action by the principal debtor on the contract to suspend suing. It is, however, a very different question whether this doctrine is to be extended for the first time to a case of a contract with a stranger, of which the debtor is ignorant, to which he is not privy, and in which the damages to the stranger for breach of contract may be merely nominal. The doctrine contended for would go the length of establishing that, whenever the creditor has placed himself in a position in which it is against his interest to sue the debtor, he has discharged the surety.

We think that the doctrine ought not to be extended to the case of a contract with a stranger. The principal debtor, having given no consideration for the promise, has no ground to complain of the breach of it, and cannot say that faith has been broken with him. There is no privity of contract with him; and we see nothing on which any right, either at law or in equity (see Lord Abinger's observations in *Lyon v. Holt*, 5 M. & W. 253, 4†), for him to insist on such a contract can be founded. The *311] stranger may have some private reason of his own to wish for *some indulgence to be shown; and, if he has given a good consideration, may be entitled to damages, nominal, or large or small, according to any legal interest he may have: but surely he is the only person to take advantage of his contract.

No such doctrine as that there can be a discharge in such case arising from a contract with a stranger has ever yet been established. In all the text books which were cited, the rule is laid down as to a binding contract *with the acceptor or principal debtor*. The case of *Moss v. Hall*, 5 Exch. 46,† on which the principal reliance was placed by the defendant, was the case of a contract with the acceptor; and it was to such a case that the observations of Lord Wensleydale were addressed: and the only case in which it has been suggested that a contract with a stranger would be sufficient is a strong authority against such a doctrine. That was the case of *Lyon v. Holt*, 5 M. & W. 250,† which was an action by the indorsee of a bill of exchange, alleged in the declaration to have been drawn by Hobson on Hynes, and endorsed by the drawer to the defendant and by him to Messrs. Woosters, and by them to the plaintiffs. The defendant pleaded that the endorsement by the defendant was not directly to Woosters, but was an endorsement by the defendant to John Holt & Co. (persons other than the defendant), and by John Holt & Co. to Woosters, and that there had been an agreement between the plaintiffs and John Holt & Co. to give time to all the parties on the bills in question, amongst others, and a giving of time in consequence. At the trial, the agreement between the plaintiff and John Holt & Co. to give time to all *312] the parties on the bill, and the giving the *time, was proved; but it was not proved that John Holt & Co. were parties to the bill. A verdict having passed for the defendants, and a rule having been obtained to enter a verdict for the plaintiffs, the question arose, whether it was a material allegation that John Holt & Co., the persons with whom the

agreement was made, were parties to the bill; and it was suggested that it was sufficient to show a contract to give time to the acceptor, and that there was nothing in the authorities to show that the contract must be *with him*. The court, after taking time to consider, held that the plea was not proved, and ordered the verdict to be entered for the plaintiffs. This was a decision that the allegation, that the person with whom the agreement to give time to prior parties on the bill is made is a party to the bill, is a material part of the plea. If, as contended in the present case, a contract with a stranger was sufficient, the plea would have been proved by proof of the contract with Holt & Co., though they were strangers to the bills.

This is a distinct authority in favour of the plaintiffs; there is no case or doctrine the other way; and the text writers all treat the agreement which is to discharge the surety as one made with the principal debtor.

We are not inclined to extend the rule for the first time to a contract with a stranger: but, for the reasons already stated, we think that the plea is bad, and therefore that judgment should be entered for the defendant.

Judgment for the defendant.

That as a general rule, any binding agreement on the part of a creditor to forbear for a time, however short, to proceed against the principal debtor, will discharge the surety, is perfectly clear: *King v. Baldwin*, 2 Johns. Ch. 554; *Manufacturers' and Mechanics' Bank v. Bank of Pennsylvania*, 7 Watts & S. 335; *Miller v. McConn*, 7 Paige 452; *Greely v. Dow*, 2 Metc. 176; *Fowler v. Brooks*, 13 N. H. 240; *McComb v. Kittridge*, 14 Ohio 348; *Brigham v. Wentworth*, 11 Cush. 123; *Bangs v. Mosher*, 23 Barb. 478; *Uhler v. Applegate*, 26 Penna. St. 140; *Peake v. Dorwin*, 25 Verm. 28; *Lime Rock Bank v. Mallett*, 34 Maine 547; *Haden v. Brown*, 18 Alab. 641. Yet mere forbearance by itself, whether in consequence of a void promise, or from mere passiveness, will not produce that effect: *Vilas v. James*, 10 Paige 76; *Sailly v. Elmer*, 2 Id. 497; *Miller v. Stem*, 2 Barr 286; *Hunter v. Jebb*, 4 Rand. 104; *Draper v. Romeyn*, 18 Barb. 163;

Nichols v. M'Dowell, 14 B. Monr. 6; *Shock v. State*, 6 Ind. 113; *Clarke Co. v. Covington*, 26 Miss. 470; *Hoyt v. French*, 4 Foster 198; *Sawyer v. Patterson*, 11 Alab. 523; *Powell v. Price*, 3 Rich. 121. Whatever may be, however, the result of the earlier authorities, the better opinion appears to be that it is not necessary that an agreement to give time, in order to discharge a surety, should be such as to actually release or suspend the debt; it is sufficient if its breach would give a right of action against the creditor. See *Dickerson v. Commissioners*, 6 Ind. 128; *Austen v. Dorwin*, 21 Verm. 38.

In an action against a surety, a plea by the latter of a discharge by an agreement to give time, must set forth the consideration of the agreement with particularity, so as to show its binding character on the face of the plea: *Green v. Blandon*, *Walker* 372; *Marshall v. Aiken*, 25 Verm. 328.

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*GEE v. SMART. July 4.

Declaration upon a covenant, by defendant and wife, to pay money. Equitable plea: that defendant and wife, by the deed in question, mortgaged certain lands, of which they were seised in fee in right of the wife, to plaintiff in fee, as a security for money (of which the sum pleaded to was parcel), lent by plaintiff to defendant and wife, at the request of the latter, for the purpose, amongst other things, of repaying, with the said sum, parcel, &c., a sum, borrowed of another person by defendant and wife, also at her request, for the purpose of discharging a debt of the wife, contracted before marriage: that the wife died, leaving plaintiff her heir at law, who thereupon became entitled to the equity of redemption in fee, in addition to the legal estate in fee simple, in the said lands: that the lands were of more value than the moneys as to which the plea was pleaded, and all costs, &c., and became, upon the death of the wife, the primary fund for paying the moneys to which the plea was pleaded; which sums, as plaintiff was entitled to the said lands, and the said moneys, and the said equity of redemption, were in equity satisfied before suit by the value of the said lands.

Held, on demurrer, that the plea disclosed facts which would entitle defendant to an absolute and perpetual injunction, and was, therefore, good as an equitable defence under The Common Law Procedure Act, 1754, sect. 83.

DECLARATION: that defendant, by deed, made between himself and Elizabeth his wife of the one part, and plaintiff of the other part, and bearing date 14th December 1855, covenanted with plaintiff to pay him the sum of 11*l.* on 14th June 1856, and the sum of 45*l.* on 14th December 1856; which last-mentioned days had elapsed before the commencement of this suit. Breach: Non-payment.

Second plea, by way of equitable defence, as to 3*l.* 10*s.*, parcel of the said 11*l.*, and as to 143*l.* 10*s.*, parcel of the said 45*l.*: That, at the time of the making of the said deed, defendant and his wife were seised in their demesne as of fee, in right of the said wife, of and in certain lands and premises, with the appurtenances: that, by the said deed in the declaration mentioned, the said lands and premises, with the appurtenances, were conveyed by defendant and his said wife to plaintiff in fee simple, by way of mortgage, for securing to the plaintiff the moneys in the declaration mentioned, which consisted of 440*l.* lent by the plaintiff

*314] on the security *of the said mortgage and two sums of 11*l.* each, being two half-yearly amounts of interest on the said sum of 440*l.*: that the said sums to which this plea is pleaded consist of 140*l.*, and two sums of 3*l.* 10*s.* each, being two half-yearly amounts of interest on the said sum of 140*l.*: that all things necessary for giving validity to the said conveyance were done as required by the Act for the abolition of Fines and Recoveries: whereupon and whereby defendant and his said wife became and were, in right of the said wife, in equity entitled to an estate of inheritance in fee simple in the equity of redemption of the said lands and premises with the appurtenances, and so continued until and at the time of the death of defendant's said wife; and by force of the said conveyance the plaintiff became and was, and until and at the death of the defendant's said wife continued to be, seised in his demesne as of fee of and in the said lands and premises with the appurtenances: that defendant's said wife, afterwards and before the commencement of this suit, died, leaving the plaintiff, her eldest brother and heir at law, her surviving, and without leaving any issue, and that there never was any issue born alive of his said wife by him the defendant begotten: and that upon her death the said equity of redemption descended to the plaintiff, who thereupon united and still unites in his own person the right to the said equity of redemption in fee and to the legal fee simple of and in the said lands

and premises, with the appurtenances : that, before the intermarriage of defendant and his said wife, his said wife contracted with a certain person to pay to that person 540*l.* for certain work and materials to be by the said person done and provided : that, after defendant's said marriage, the sum of 140*l.*, parcel of the said 540*l.*, *being due from his [*315 said wife and payable by virtue of the said contract, defendant and his wife borrowed a certain sum of money, to wit, 235*l.*, for the purpose, amongst other things, of paying, with the sum of 140*l.*, parcel thereof, the said debt of 140*l.* ; on which occasion defendant gave to the lender of the said money his, the defendant's, bond for securing payment of the said sum of 235*l.* : that with 140*l.*, part of the said sum of 235*l.*, the said debt of 140*l.*, so due from the said wife, was by defendant and his said wife, and at her request, paid and satisfied : that the moneys in the declaration mentioned consist of the sum of 440*l.* and two half-yearly payments of interest thereon, amounting to 11*l.* each : that the said sum of 440*l.* was borrowed by defendant and his said wife, of the plaintiff, at the request of his said wife, for the purpose of paying, with other 140*l.*, parcel thereof, the said sum of 140*l.*, parcel of the said sum of 235*l.* : that with the said sum of 140*l.*, parcel of the said sum of 440*l.*, the said sum of 140*l.*, parcel of the said sum of 235*l.*, was by defendant and his said wife, at her request, and in her lifetime, paid and satisfied ; whereby and by payment of the residue of the money secured thereby the said bond was satisfied : that, except as aforesaid, defendant had no interest in the said sum of 140*l.*, parcel of the said sum of 235*l.*, or in the said sum of 140*l.*, parcel of the said sum of 440*l.* : that the said lands and premises, at the time of the death of his said wife, were and thence continually have been and still are of much greater value than the said sums in the declaration mentioned, and all the damages by the plaintiff sustained by reason of the non-payment thereof, and all costs, damages, and expenses which the plaintiff, *as mortgagee, is entitled to charge [*316 on the said lands and premises : "and so the defendant says that, by reason of the matters aforesaid, the said lands and premises became and were, upon the death of his said wife, the primary fund for payment of the said sum of 143*l.* 10*s.* and of the said sum of 3*l.* 10*s.* ; and that, as the plaintiff was and is entitled as aforesaid to the said lands and premises, and also to the said last-mentioned sums of money, and to the said equity of redemption, the moneys last aforesaid were in equity satisfied before this suit by the value of the said lands and premises ; all which the plaintiff knew before this suit."

Demurrer. Joinder in demurrer.

The first and third pleas, which were also demurred to, alleged that the moneys, parcel, &c., to which they were pleaded, were borrowed by defendant at the request of his wife, and laid out by her in improvements on the said premises : stating the mortgage of the premises as security, and the subsequent vesting of them in the plaintiff as heir at law. These pleas were abandoned on the argument.

Phlipson, for the plaintiff.—The second plea does not raise an equitable defence within the meaning of The Common Law Procedure Act, 1354 (17 & 18 Vict. c. 125), sect. 83. To do that, it must disclose such a state of facts as would entitle the defendant to an unconditional injunction in a Court of equity. Now it does not show what benefit the defendant and his wife have respectively derived, or what the plaintiff

may have derived, from the loan; so that a Court of equity would have *317] to call the parties before it, in order to learn their relative position, and to ascertain, according to the principle adopted in *Earl of Kinnoul v. Money*, 3 Swanst. 202, note (a); the application of the sum raised upon the mortgage. An unconditional injunction, therefore, could not be granted here; and the plea therefore fails as an equitable defence.

Further, the plea does not allege that the interest became due after the death of the wife; and it is therefore, at all events, bad as to that.

Unthank, for the defendant.—Under the circumstances stated in the plea, a Court of equity would at once peremptorily enjoin the plaintiff from suing. *Lewis v. Nangle*, Ambl. 150, is in point. That case is referred to in a note to *Evelyn v. Evelyn*, 2 P. Wms. 664, n. (1) (6th ed.), where all the cases upon the subject are collected. As to the interest, it follows the principal, and is a charge upon the same fund: *Leman v. Newnham*, 1 Ves. Sen. 51.

Phipson, in reply.—There is no case in which an unconditional injunction has been granted under these circumstances. The general rule in a Court of equity is, that the mortgagee may take all his remedies at once. *Lewis v. Nangle* is commented upon, in *Earl of Kinnoul v. Money*, by Lord Camden, who says that it “is so particular a case, that it cannot serve as a precedent; nor is it an authority to govern in any other case, unless the circumstances are very like it.” *Cur. adv. vult.*

COLERIDGE, J., now delivered the judgment of the Court.

*318] This is an action of covenant for the payment of money, to which three pleas are pleaded by way of equitable defence; of these the first and third were given up on the argument; and the question we reserved for consideration was the validity of the second. This plea is pleaded as to two sums of 3*l.* 10*s.* and 143*l.* 10*s.* respectively, parcel of two larger sums of principal and interest mentioned in the declaration. And the plea discloses these facts. (His Lordship’s statement of the facts corresponded with the allegations in the plea, with the additional fact that the wife died intestate.)

In substance, the plea discloses that the covenant on which the defendant is sued is a covenant entered into, as regards the moneys stated in the commencement of the plea, and to which it is pleaded, for the payment of money borrowed by the defendant to recoup himself for money which he had before borrowed and applied in order to pay off a liability contracted by his wife before marriage; that both loans were effected, and the moneys on both occasions applied, at the request of his wife, and the securities executed jointly with her, and at her request; and that the land has now descended on the plaintiff as her heir at law, being of more than sufficient value to meet all the charges so created on it. As the wife was seised in fee, and therefore had power to charge the estate, and as the plaintiff, if the charge had in fact been made in favour of a third person, must have taken the estate subject to such charge, he certainly sustains no hardship if he be now made to bear the burthen of it; and, as the charge was created by the wife substantially to pay off her own debt, it certainly seems equitable that her estate, and not the defendant’s personal estate, should be first charged with the burthen of it.

*319] The question is, however, whether this is such a plea as, under the 88d section of The Common Law Procedure Act, 1854, we

are authorized to receive. And several cases have decided that, to make it such, the facts it discloses must entitle the defendant to an absolute and perpetual injunction against the judgment which the plaintiff might otherwise have obtained at law. If our common law judgment on the plea for the defendant will not do final justice between the parties, but the plea is in the nature of a bill in equity, calling upon the Court for that sort of conditional and manifold award which is in the nature of a decree in equity, and not a judgment at law, we cannot entertain it, because we have no authority to pronounce, or machinery to enforce, such an award.

There are many cases in equity where, money having been borrowed on the security of the wife's estate for the discharge of the husband's debt, relief has been given and the wife's estate exonerated, at least until the husband's has been exhausted. They will be found collected and well commented on in Mr. Bright's Treatise On the Law of Husband and Wife, vol. I. ch. xvi.; and the rule appears to have been applied where the money borrowed was in part only for the discharge of the husband's debt, and in part for that of the wife's, contracted before marriage. There the wife's estate will be exonerated in part; for that part she will be considered to have been his creditor; and for the remainder her estate will be liable. The same principle seems clearly applicable in the converse case, where the object of the proceeding is to charge the personal estate of the husband primarily, and exoneration is sought for that, by throwing the primary charge on the wife's estate, on the ground of **the covenant having been only for a discharge of* [*320 *her debt.* Thus, in *Bagot v. Oughton*, 1 P. Wms. 347, where the land had descended to the wife subject to a mortgage, and, after marriage, the mortgagee wanting his money, the husband joined in an assignment of the mortgage, and covenanted that he or his wife, or one of them, would pay the money, the question was, whether the husband's personal estate should be liable to pay it under this covenant: and the Lord Chancellor decreed that this covenant should not oblige his personal estate to go in ease of the mortgaged premises, for as much as, the debt being originally that of the wife's ancestor, and continuing to be so, the covenant upon the transferring the mortgage was an additional *security for the satisfaction only of the lender*, and not intended to alter the nature of the debt. If, then, this had been a case like the one just cited, in which three interests were concerned, the husband, the wife's estate, and the lender's, we should have thought that, at all events, it was not one in which we ought to interfere, for want of power to institute those inquiries which a Court of equity has the means of making, and so doing complete justice between the parties: but this is a case in which there are but two estates concerned, the husband's and the mortgagee's, in which now by inheritance, the wife's is, as it were, merged. The principal mortgagor and mortgagee have become one. Now, even so, it may be that the plaintiff might have circumstances to show why the defendant should still remain without exoneration: it might be capable of proof, for example only, that at the time of the loan it was agreed that, even in the event which has happened, he should remain **liable in solido* for the whole advance, and that, but for this, the [*321 money could not have been advanced: but, if this or any similar circumstance exists, it should have come, we think, by way of replica-

tion; for we should have been able to deal with the issue so raised. The plaintiff not having alleged it, we are not to presume its existence. We must take the plea to raise all the circumstances material for our determination. These seem to raise a clear and simple case for exoneration; and therefore we give judgment for the plea.

Judgment for the defendant.(a)

(a) Reported by Francis Ellis, Esq.

Where a wife mortgages her own property for her husband's debt, she stands in the ordinary position of a surety, and is consequently entitled to exoneration out of his estate: *Neimcewicz v. Gahn*, 3 Paige 614; *Sheidle v. Weishlee*, 16 Penna. St. 134; and if her estate is joined with her husband's in one mortgage, under such circumstances, the latter must be first sold: *Loomer v. Wheelwright*, 3 Sandf. Ch. 135; *Johns v. Rearden*, 11 Maryl.

465; or if her estate has been sold, she is entitled to subrogation to the mortgage, as against her husband: *Sheidle v. Weishlee*, 16 Penna. St. 134. On the other hand, where the mortgage by the husband and wife, is of the wife's separate estate, parol evidence is admissible to show that the money was really advanced to the wife, and the husband in fact the surety: *Gray v. Downman*, 27 L. J. Ch. 702.

LE FEUVRE v. MILLER. July 4.

The Public Health Act, 1848 (11 & 12 Vict. c. 68), sect. 103, enacts that all rates made or collected under it "shall be published in the same manner as poor-rates." Held, that a rate, made under the Act, was not null and void by reason of not having been so published: that on a summons before justices to enforce it, the rate not having been appealed against, they were justified in refusing, as immaterial, evidence of non-publication: and that therefore the officer executing their distress warrant was protected by it.

REPLEVIN. Second plea: That, under The Public Health Act, 1848 (11 & 12 Vict. c. 68), a provisional order (afterwards confirmed) was made by the General Board of Health, applying the Act to the town of Southampton, and making the Mayor, aldermen, and burgesses the Local Board: and that "the supposed taking by the defendant of the goods and chattels of the plaintiff in the declaration mentioned, and the supposed detaining of the same, were matters and things done by the defendant as and then being an officer and person then acting under *322] the direction of the Local *Board aforesaid; and that those matters and things were so done bonâ fide for the purpose of executing The Public Health Act, 1848, according to the true intent and meaning of that Act."

Demurrer. Joinder.

Second replication to second plea: That the said taking and detaining were a seizing and distraining by the defendant under colour of certain assessments made upon the plaintiff in and by certain alleged rates alleged to have been made by the said Local Board under and by virtue of the said Public Health Act, 1848, and under colour of certain alleged warrants of justices for the levying of the same; "whereas the said alleged rates had not, nor had any or either of them, been pub-

lished in the same manner as poor-rates, nor in any other manner as by law required:" that, at the hearing of the summons before the said justices, the plaintiff tendered evidence of the non-publication of the said rates, but that the justices decided that such evidence was irrelevant, and wrongfully refused to admit it: that the plaintiff entered a plaint against the defendant in the county court, duly replevied the said goods, and brought the action in pursuance of the replevin-bond.

Demurrer. Joinder.

Second rejoinder to the above replication: That the rates were duly made by the Local Board under the authority of the said Act: that the plaintiff was duly assessed to the said rates, and failed to pay the same for fourteen days after demand in writing: and that thereupon he was duly summoned before the justices at the request and by the direction of the said Local Board. The rejoinder then stated the proceedings before the justices, and set out the warrants in full. It further *alleged that the summons was taken out and the warrants were [*323 issued at the request and by the authority of the Local Board, and the warrants directed to defendant, collector of the rates, among others: that the causes of action were the taking and detaining under and by virtue of the said warrants; and that such taking and detaining were matters and things done by defendant as the bailiff and servant, and under the command, of the said Local Board, and were done bonâ fide for the purpose of executing the Act: that there never was any appeal against the said rates or against the said order of justices, or any notice of appeal, although the time for such appeal and notice had elapsed before the said taking and detaining; that the plaint against defendant in the county court was entered, and the replevin-bond executed, without his knowledge or consent; and that the plaint might have been brought against the Local Board. The rejoinder further set out in full the plaint, the writ of re. fa. lo., and the return to it, and alleged that the defendant's appearance "in Her Majesty's Court here" was "an appearance according to the course and practice of the same Court according to the exigency of the writ hereinbefore set forth, and not otherwise."

Demurrer. Joinder.

G. Rochfort Clarke, for the plaintiff.—The questions which arise upon these demurrers are, first, whether the rates were bad by reason of not having been published; and, secondly, if so, whether the officer of the Local Board is protected by sect. 140 of The Public Health Act, 1848.

As to the validity of the rates. Sect. 103 enacts that "all rates made or collected under the authority of this *Act shall be published in the same manner as poor-rates." Now the mode in [*324 which poor-rates are to be published is provided by stat. 17 G. 2, c. 8, and stat. 7 W. 4 & 1 Vict. c. 45. Sect. 1 of the former Act provides that "the churchwardens and overseers, or other persons authorized to take care of the poor in every parish, township, or place, shall give, or cause to be given, public notice in the church, of every rate for the relief of the poor, allowed by the justices of peace, the next Sunday after the same shall have been so allowed; and that no rate shall be esteemed or reputed valid and sufficient so as to collect and raise the same, unless such notice shall have been given:" and sects. 1, 2, of stat. 1 Vict. c. 45, substitute, for such public notice in the church, a written

notice affixed to the church door. In *Rex v. Newcomb*, 4 T. R. 368, it was held that the omission to publish a poor-rate in the form provided by stat. 17 G. 2, c. 3, was a radical defect in the rate, which nothing could cure. [WIGHTMAN, J.—That statute does not make the rate absolutely null and void, if not properly published; but only invalid as to the power of collecting and raising it.] That is sufficient to make the replication here good. In *Sibbald v. Roderick*, 11 A. & E. 38 (E. C. L. R. vol. 39), which was decided after the passing of stat. 7 W. 4 & 1 Vict. c. 45, the want of proper publication of the rate was held to invalidate a distress warrant for enforcing it. Sect. 106 of The Public Health Act, 1848, provides that the rate-books shall be "*primâ facie*" evidence of the validity of the rate. That shows that it is open to any party assessed to rebut such *primâ facie* evidence. It is contended, on the other side, that the proper mode of doing this is by appeal, under sect. 135. But *325] that section provides for an appeal against any rate *made* *under the provisions of the Act: and it is clear that the rate here was not a rate so made, inasmuch as it was not published in the form prescribed by those provisions. The justices, therefore, ought to have entered into the question of publication before issuing the warrant.

Next, as to the liability of the officer. The defendant relies on sect. 140, which provides "that no matter or thing done" "by the Local Board," or "officer or person whomsoever acting under the direction of the said Local Board, shall, if the matter or thing were done" "*bonâ fide* for the purpose of executing this Act, subject them or any of them personally to any action, liability, claim, or demand whatsoever; and any expense incurred by any such Local Board" or "officer or person acting as last aforesaid, shall be borne and repaid out of the general district rates levied under the authority of this Act." But the effect of that provision is, not that an officer of the Local Board is exempt from an action in respect of matters done by him *bonâ fide* under their authority, but that he is exempt from personal *liability*; that is to say, if an action is brought against him, he shall be recouped by the Local Board for all expenses to which he may be put in consequence. "Expense" is clearly intended to be a wide description, and to include costs and damages. That an action may, in the first instance, be brought against the officer is clear from sect. 139, which provides within what time, after notice of action, the writ may be issued. [COLERIDGE, J.—How do you distinguish the present case from *Ward v. Lee*, 7 E. & B. 426 (E. C. L. R. vol. 90)?] It can hardly be said that stat. 11 & 12 Vict. c. 112, on the construction of which that case turned, is in *pari* *326] *materiâ* with The Public Health Act, 1848: but, even if it be, the action there was upon the case, for negligently stopping up a drain, and does not stand upon the same grounds as an action of *replevin* in respect of a distress. Sect. 131 of The Public Health Act, 1848, provides that no distress shall be illegal for want of form, but that the party aggrieved may bring an action on the case. That confirms the construction which the plaintiff contends should be put upon sects. 139, 140; namely, that the officer is liable to an action, but not liable for the consequences. [WIGHTMAN, J.—Against whom does sect. 131 provide that an action may be brought? Why the officer more than the Local Board? CROMPTON, J.—Sect. 131 seems to refer to the proceedings before the justices, and sects. 139, 140, to proceedings

under the immediate authority of the Local Board.] Perhaps so: but, as regards the distress, the defendant is, practically, an officer of the justices. [WIGHTMAN, J.—The plea alleges that he is an officer of the Board; and the demurrer admits that. Then, sect. 140 provides that if he be, and have acted bonâ fide for the purpose of executing the Act, he is not to be personally liable.] That means, not liable to the consequences of an action against him; it does not mean that he is not liable to be sued. [WIGHTMAN, J.—But, at all events, does an action of replevin lie here? Ought not the plaintiff to have appealed?] Here the justices, in issuing their distress warrant without entering into the question of publication, were guilty of an excess of jurisdiction; an action of replevin, therefore, lies: *Milward v. Coffin*, 2 W. Bl. 1330. [COLERIDGE, J.—There is a later case, *Churchwardens of Birmingham v. Shaw*, 10 Q. B. 868 (E. C. L. R. vol. 59), (a) *in which two other [*327 cases, illustrating the question, are cited: *Fawcett v. Fowlis*, 7 B. & C. 394 (E. C. L. R. vol. 14), and *Marshall v. Pitman*, 9 Bing. 595 (E. C. L. R. vol. 23).

H. Bullar, for the defendant.—As to the liability of the officer. Sect. 140 is clearly intended to protect him against an action of replevin under these circumstances; the language of the section is sufficiently wide to comprehend every description of proceeding against him. As to the argument that the words “and any expense,” &c., qualify the previous part of the provision, so as to leave the officer liable to an action, though not liable for the consequences, it is clear that, so far from qualifying, they amplify and explain the preceding provision. The officer is not only to be exempt from an action; but he is to be exempt from the expense caused by an action having been wrongfully brought against him. [WIGHTMAN, J.—Against whom do you say that the plaintiff ought to have proceeded?] Against the Local Board as a body. [WIGHTMAN, J.—Would replevin lie against them?] Yes, if they had commanded the taking, and the taking were in itself wrongful, as here: *Com. Dig. Replevin* (C); *Mennie v. Blake*, 6 E. & B. 842 (E. C. L. R. vol. 88). [CROMPTON, J.—I do not see how the Local Board could have justified under a warrant not directed to them.] The defendant is acting by the authority of a body who either have jurisdiction or have not: if they have not, sect. 140 does not apply; if they have, their officer is protected, and they are liable to an action of replevin for an illegal distress. *Ward v. Lee*, 7 E. & B. 426 (E. C. L. R. vol. 90), is in point; and the principle is illustrated by *Painter v. Liverpool Gas Company*, 3 A. & E. 433 (E. C. L. R. vol. 30), *Yarborough v. *The Bank of England*, 16 East 6, *Maund v. The Monmouthshire Canal Com-pany*, 4 M. & G. 452 (E. C. L. R. vol. 43), and *Davies v. Mayor, &c., of Swansea*, 8 Exch. 808.† As to the argument that the distress was practically a proceeding before the justices, the record clearly shows that the proceedings originated with the Local Board. [CROMPTON, J.—Suppose the Local Board pleaded *Non ceperunt*.] Evidence might be given that the officer had acted under the authority of the clerk to the Board. Moreover, sect. 129 provides that any penalties imposed by the Act may be enforced by a warrant of distress. These penalties are so numerous that it is obvious that the intention could not have been that the officer should be personally liable for enforcing them. But, further,

(a) See *Re Williams*, 2 E. & B. 84 (E. C. L. R. vol. 75).

by sect. 104, any constable refusing to levy, when duly required, is himself liable to a penalty: it is utterly inconsistent with that provision that he should be liable to an action at the suit of the person upon whom he levies.

As to the validity of the rate. The provision in sect. 103, as to publication, is merely directory. The rates are to be published "in the same manner" as poor-rates; but the section does not attach those consequences to non-publication which are attached to the non-publication of poor-rates by stat. 17 G. 2, c. 3, and stat. 7 W. 4 & 1 Vict., c. 45. *Ormerod v. Chadwick*, 16 M. & W. 367,[†] shows what is to be held a proper compliance with the rules for publication imposed by those statutes. By them it is especially provided that the rate, if not duly published, shall not be recoverable. But sect. 99 of The Public Health Act, 1848, provides that public notice that the rate is to be made, and of the place where the statement of it is deposited for inspection, is to
 *329] be given by the Local Board at least a week before the rate is made: so that the rate, in fact, is made public before it is formally published. It is clear, therefore, that the rate here was not a nullity for want of formal publication, and, consequently, that the proper course for the plaintiff was to have appealed, under sect. 135. [COLERIDGE, J.—If the appeal clause be large enough in terms, an appeal would lie even if the justices had exceeded their jurisdiction.] That is clear from *Churchwardens of Birmingham v. Shaw*, 10 Q. B. 868 (E. C. L. R. vol. 59), and *Marshall v. Pitman*, 9 Bing. 595 (E. C. L. R. vol. 23); but here, moreover, the Local Board clearly had jurisdiction, and therefore, according to the principle laid down in those cases, the plaintiff was bound to proceed by appeal.

G. Rochfort Clarke, in reply.—The replication avers that the rates had not been published "in any other manner as by law required:" the defendant, therefore, cannot now contend that there was any practical publication of them. The rates must be treated, therefore, as a nullity. [WIGHTMAN, J.—Suppose the justices had entered into the question of publication, and had still decided that the rates were valid. In that case the plaintiff would have been bound to proceed by way of appeal.] Perhaps so: but they have chosen to exceed their jurisdiction by not entering into the question at all. [WIGHTMAN, J.—They decided that the evidence of non-publication was not material.] A refusal to admit the evidence, on the ground of its being immaterial, amounts to a refusal to adjudicate at all upon the point. Sect. 103 is
 *330] not merely directory: it must be taken to *import the provisions in stat. 17 G. 2, c. 3, s. 1, as to the consequences of non-publication. As to sect. 104, that imposes a penalty only on any constable authorized by the warrant who refuses to levy. Here the authority of the warrant was deficient: and the officer could not be liable to a penalty for refusing to act under a warrant which the justices had no right to issue.

Cur. adv. vult.

COLERIDGE, J., now delivered the judgment of the Court.

This was an action of replevin, to which the defendant pleaded that the taking and detaining were matters and things done by the defendant as an officer and person acting under the direction of the Local Board of Health for Southampton, and were done for the purpose of executing "The Public Health Act, 1848."

The replication to this plea stated, in effect, that the taking and detaining were for rates under The Public Health Act which had never been published; and that the justices, at the hearing of the summons for enforcing the rates, refused to receive evidence of non-publication; and that the taking and detaining were under the warrants of the justices for enforcing the rates; and that the plaintiff replevied the goods; and that the present action was the action brought in pursuance of the replevin bond.

The defendant rejoined, setting out the proceedings before the justices, the warrants and the proceedings in the county court, and the re. fa. lo. in the present replevin suit. It was stated, in the rejoinder, that the summons before the magistrates was taken out at the request, and by the direction and authority, of the *Local Board of Health, [831 and that the magistrates issued their warrants at the request [831 and by the authority of the Local Board, and the warrants were directed to the defendant, collector of the rates, and all constables and peace officers in the borough. And it was averred that the matters were done by the defendant, being an officer of the Board of Health, under their directions, and as their bailiff and servant, and were done bonâ fide for the purpose of executing the Act.

There was a demurrer to this rejoinder: and there were also demurrers to the plea and replication.

The questions arising on these pleadings were: first, whether the action of replevin was sustainable for goods taken under the warrants of the justices for the rates in question; and, secondly, whether the defendant was protected, by sect. 140 of The Public Health Act, 1848, as an officer of the board acting by their directions, bonâ fide, for the purpose of executing the Act.

No objection is made, as we understand, to the proceedings of the justices, except that the rate which they have sought to enforce the payment of was void and a nullity for want of publication. By The Public Health Act, 1848, sect. 103, it is enacted that all rates made and collected under the authority of the Act shall be published in the same manner as poor-rates; but it is not said that unless they are so published they shall be null and void, or of no force or validity; nor are any similar words used. Unless, therefore, a poor-rate not published on a particular day, or in a particular manner, had been null and void, we apprehend there would have been no ground for contending that this rate was void because not published as directed; and if not void, but only defective and unappealed against, the magistrates [832 *would have jurisdiction, and their decision, though erroneous, [832 would have been valid so far as regards at least the present action.

Now the poor-rate, unpublished, was made void by express words in stat. 17 G. 2, c. 3, s. 1. The preamble of that Act shows that the mischief to be remedied was the making of "unjust and illegal rates in a secret and clandestine manner." This mischief was met by requiring publication on a specified Sunday; and this remedy was enforced by express enactment that, unless it was complied with, the rate should not be esteemed valid and sufficient so as to collect the same; and *Rex v. Newcomb*, 4 T. R. 368, followed by *Sibbald v. Roderick*, 11 A. & E. 38 (E. C. L. R. vol. 39), proceeded on this express provision: and, upon the same principle, in *Regina v. Fordham*, 11 A. & E. 73 (E. C. L. R.

vol. 39), where the Court had to construe the Parochial Assessment Act, 6 & 7 W. 4. c. 96, s. 2, which in express terms enacts that every poor-rate shall contain certain particulars, and that a certain number of the parish officers shall, before its allowance by justices, sign the declaration given at the foot, adding "and otherwise the said rate shall be of no force or validity," we restrained this nullifying clause to the last preceding paragraph, and held a rate not void for non-compliance with the preceding requisitions.

This shows that, where, in such a matter as a rate, the Legislature requires a thing to be done not in itself essential to the validity of it, and does not in terms specify what shall be the consequence of non-compliance, the Court will not make that consequence to be an avoidance of the whole, and for a good reason. Many *particulars, *333] many forms, are requisite to the perfection of a rate, which is usually made on many individuals; some are of more, some of less, practical importance: if non-compliance in any one respect is to involve nullification of the whole rate, it is exceedingly difficult for the Court to make any distinction; and the greatest inconvenience may result. Williams, J., asks, very pertinently, in the case just cited, "suppose ten thousand persons are included in the rate, and there is an omission of one particular in a single instance: is the party who levies the rate to be a trespasser?" No inconvenience follows from holding the other way; for if the defect occasions a grievance to any individual, he may appeal.

Then does it follow, because The Public Health Act, 1848, orders that this rate shall be published in the same manner as a poor-rate, that it therefore imports the consequence specially provided, under particular circumstances, in case of non-publication, by stat. 17 G. 2, c. 3? Suppose, instead of reference, it had taken the very words from stat. 17 G. 2, c. 3, but omitted the nullifying clause: could it have been contended that the consequence would have followed? We think not; and yet that is, in effect, all it has done: it merely provides the manner, affirmatively, in which publication shall be made: but surely the publication, and the consequence of non-publication, are two distinct things.

Moreover, the circumstances are not the same. Stat. 17 G. 2, c. 3, speaks of the unlimited power of churchwardens and overseers, their making rates on frivolous pretences and for private ends, unjust and illegal rates in a secret and clandestine manner. Here the rate is made *334] by an elective board, who must first cause an *estimate to be made, to be entered in a rate-book, and kept open to public inspection; they must give public notice of their intention to make the rate, of the time at which it is intended to make the same, and of the place where a statement of the proposed rate is deposited for inspection. Moreover, any one interested may inspect and take copies of the rate and estimate.

It seems to us that, after this preliminary notoriety is thus secured, the publication of the rate on the church doors is a mere form, not very important. But, whether important or not, we think the Legislature has not, in terms, made it void if not published, and that we have no authority to make it so. Being of this opinion, it follows that we think

the magistrates were right to hold the non-publication of no importance when the rate had not been appealed against; and, therefore, that the defendant was well defended by their adjudication and warrant.

This makes it unnecessary to consider the second question; and judgment will be for the defendant. Judgment for defendant.(a)

(a) Reported by Francis Ellis, Esq.

***MEMORANDUM OF TRINITY VACATION. [*335**

In this Vacation the following barristers were appointed Queen's Counsel.

The Honorable Edmund Phipps, of The Inner Temple, Esquire.

Charles Wordsworth, of The Inner Temple, Esquire.

John Locke, of The Inner Temple, Esquire.

And

Gillery Pigott, Esquire, Serjeant at law, received a patent of precedence.

The following barristers were also, in the same Vacation, appointed Queen's Counsel.

Allan Maclean Skinner, of Lincoln's Inn, Esquire.

John Walter Huddleston, of Gray's Inn, Esquire.

Robert Lush, of Gray's Inn, Esquire.

John Monk, of The Middle Temple, Esquire.

William Forsyth, of The Inner Temple, Esquire.

Henry Manisty, of Gray's Inn, Esquire.

END OF TRINITY VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

AT

Michaelmas Term,

XXI. VICTORIA. 1857.

The Judges who usually sat in Banc in this Term were :

LORD CAMPBELL, C. J.
COLERIDGE, J.

WIGHTMAN, J.
ERLE, J.

THOMAS WEBSTER TENNANT *v.* AUGUSTA FIELD. *Nov. 3.*

A landlord entered upon a dwelling-house held of him, to distrain for rent arriere. To prevent inconvenience to the tenant, the landlord, with the tenant's assent, instead of removing the articles of furniture, upon which he proposed to distrain, made up, from a list given to him by the tenant, an inventory of the furniture in the house, put a man into possession, and handed to the tenant a notice of the distress referring to the inventory, which was also then handed to the tenant. The landlord did not go into the several rooms in which the articles were.

Held, that this constituted a distraining of the articles mentioned in the inventory and an impounding of them upon the premises; and that a tender subsequently made was too late. Although the notice of distress did not state that the articles were impounded.

REPLEVIN, for taking, in a dwelling-house, goods and chattels of plaintiff, to wit, household furniture, and unjustly detaining them against sureties, &c.

*337] *Avowry, alleging that plaintiff, for half a year next before and ending on 25th December, 1856, held the dwelling-house in which, &c., as tenant to defendant, by virtue of a demise to plaintiff at the yearly rent of 180*l.*, payable quarterly on 25th March, 24th June, 29th September, and 25th December: and, because 48*l.* 3*s.* 9*d.*, parcel of 65*l.* of the rent for the half year ending on 25th December in the year aforesaid, and thence until the time when, &c., was in arrear from plaintiff to defendant (the residue having been before paid), defendant

avowed the taking in the name of a distress for the said 48*l.* 3*s.* 9*d.*, parcel, &c., so due, &c.

Pleas. 1. As to 12*l.* 10*s.* 6*d.*, parcel of the 48*l.* 3*s.* 9*d.*: that no part of the 12*l.* 10*s.* 6*d.* was or is in arrear, &c.

2. As to the residue of the avowry: that, after the taking of the said goods and chattels, and before impounding the same, the plaintiff tendered to the defendant the sum of 35*l.* 13*s.* 3*d.*, the same being all the moneys due for rent as in the said avowry mentioned, together with 2*l.* 2*s.* 9*d.* for the costs and expenses of the taking of the said distress; the last-mentioned sum being reasonable and sufficient for the costs and expenses in that behalf. Which several sums respectively the defendant wholly refused to accept; and afterwards unjustly detained, &c.

Issues on both pleas.

On the trial, before Coleridge, J., at the Middlesex Sittings in last Easter Term, the facts, so far as regarded the second issue, appeared to be that the defendant's agent entered the house of the plaintiff, for the purpose of making the distress, while the plaintiff was absent. The agent had an interview with the plaintiff's wife; and *it was [*338 agreed between them that, as there were lodgers in the house whom it might be advisable not to disturb, the plaintiff's wife should give to the agent a list of the goods in the house, without the agent going through the rooms. This was done; and an inventory was made out in conformity with this list, which was forwarded to the plaintiff, with a notice of distress, which stated that the agent had distrained the goods mentioned in the inventory, but did not state that they were impounded. In the notice was contained the following: "Removing any goods off the premises to avoid a distress, or any person aiding, assisting, or concealing the same, will subject themselves to double the value of such goods and chattels, so removed or concealed, or suffer imprisonment," &c. The agent put a man into possession. On the plaintiff returning to his house, he thanked the agent for the courteous way in which the latter had conducted the distress. Afterwards the plaintiff tendered the sum mentioned in the second plea; but the tender was refused.

On these facts, the learned Judge directed the jury to find a verdict for the plaintiff on the second issue, reserving leave to move as after mentioned. On the first issue, the plaintiff had a verdict.

M. Chambers, in last Easter Term, obtained a rule to show cause why a nonsuit should not be entered, or why a verdict should not be entered for the defendant on the second issue, "on the ground that there was no tender before impounding, but that it was after impounding, and was too late."

H. Hawkins and *W. D. Seymour* now showed cause.—*There [*339 was no impounding before the tender: nothing was done beyond the mere distress. *Thomas v. Harries*, 1 M. & G. 695 (E. C. L. R. vol. 39), may be relied upon for the defendant. In that case the Court of Common Pleas, with hesitation on the part of Bosanquet, J., and Erskine, J., and against the opinion of Maule, J., held that the impounding was complete, so far as to make a subsequent tender unavailing, where the distrainer had delivered to the distrainee a notice of distress, wherein it was stated that the cattle distrained, of which an inventory had been given, were impounded upon the premises. Now,

whatever be the authority of that case, it is inapplicable here; for the notice here does not state the impounding. [Lord CAMPBELL, C. J.—What further act could be done here?] There should have been some act of taking into possession, such as opening a door, separating the goods distrained, removing them to a particular place, or the like. [COLERIDGE, J.—A man is put into possession.] Maule, J., in *Thomas v. Harries*, considered that the tenant had the right of tendering as long as the goods remained on the premises. At any rate, a particular part of the house should be constituted a pound, and the goods be removed thither. [Lord CAMPBELL, C. J.—Suppose every room in the house to be full.] That might make a difference. But at all events, as distraining is one thing and impounding another, something must take place besides the seizing; else the mere distraining would be an impounding. In *Washborn v. Black* (a) Lord Mansfield said that the strict law was that goods distrained in a house should all be put into one room of *340] the house, or removed from the house; though, in an action of trespass, the jury might infer from circumstances the consent of the distrainee to a departure from this rule. And, accordingly, in *Woods v. Durrant*, 16 M. & W. 149,† Parke, B., says, that *Washborn v. Black* “is an authority, that in common cases, a party distraining in a dwelling-house must not take the whole of it in which to place the goods, but must select one room for that purpose, or remove them out of the house.” There was not here even a manual contact with the goods distrained, as in *Wood v. Nunn*, 5 Bing. 10 (E. C. L. R. vol. 15): the bailiff did not even see them. The landlord might have locked up the goods in the house; *Cox v. Painter*, 7 C. & P. 767 (E. C. L. R. vol. 32): but he has here done nothing which would preclude him from afterwards impounding the goods elsewhere. [COLERIDGE, J.—Little more was done in *Swann v. The Earl of Falmouth*, 8 B. & C. 456 (E. C. L. R. vol. 15).] The question is whether what was done was “to impound;” it seems, at the utmost, to have been only to “otherwise secure;” a different act, within stat. 11 G. 2, c. 19, s. 10. Independently of that statute, the goods could not have been impounded upon the premises at all: *Peppercorn v. Hofman*, 9 M. & W. 618.†

Overend and Raymond, contra.—The goods were designated in the inventory, which was forwarded to the tenant; and a notice was given that they were not to be removed. Surely that, coupled with the circumstance that a man was left in possession, was an impounding. Stat. 11 *341] G. 2, c. 19, s. 10, allowed of the *impounding on the premises, in order to do away with the inconvenience of the common law rule that the goods must be taken off the premises. In either case of impounding the goods are in *custodiâ legis*; and after that has taken place the tender is too late. The whole law as to this appears in *Ladd v. Thomas*, 12 A. & E. 117 (E. C. L. R. vol. 40). In *Washborn v. Black*, 11 East 405, n. (a), the question was whether the distrainer had committed a trespass. In *Swann v. The Earl of Falmouth*, 8 B. & C. 456 (E. C. L. R. vol. 15), the question arose on an action for an excessive distress. But there it was held that the goods distrained were impounded on the premises, though all that the distrainer had done was to enter, view the goods, and give notice that they were distrained, and no one was left in possession. No distinction was intended, by stat. 11

(a) Note (a) to *Winterbourne v. Morgan*, 11 East 405.

G. 2, c. 19, s. 10, between impounding and otherwise securing: the Act was merely directed to the inconvenience of the necessity of removing the goods, which pressed upon the tenant as well as upon the landlord. The house in which the goods are distrained may, under the statute, be made the pound: but that is the whole change. Here the plaintiff, by sanctioning his wife's act, has assented to the whole house being so treated.

LORD CAMPBELL, C. J.—The only question is, whether there was an impounding before a tender: the fact of the tender is not disputed. Now it cannot be denied that, if the goods had been all put into one room, and notice given that they were distrained and impounded, that would have been a good impounding. But is not what took place tantamount to that? When the broker *is about to distrain, the tenant's [*342 wife agrees to a particular mode of proceeding, which the tenant afterwards ratifies and sanctions. The goods are not removed: but the broker and the wife take an inventory of all; a man is left in possession; and an inventory of that which is left in his possession is handed to the tenant. The tenant comes home and sees all, and assents. Is he to be allowed to say that this is not an impounding? I think not. It is a very ungracious return to the favour shown to him. Nothing had taken place to prejudice his rights; and the distrainor had abstained from doing what might be injurious to him. The removal might most materially have injured him. Does not this amount to making a pound of the rooms in which the distrained goods were? I am of opinion that it does, and that, consistently with the authorities, there has been an impounding before the tender.

COLERIDGE, J.—I am of the same opinion. It is easy to put extreme and difficult cases: but I think that it is not necessary to lay down a general rule which is to govern every case. What was done by the wife was really the same as if it had been done by the husband, since he acquiesced. Now suppose he had been present at the first, and the broker had said to him: "I am about to take possession of the goods which are in the rooms where the lodgers are; but, instead of my distraining them, and taking all the goods into one room and constituting that a pound, give me the names of the goods; and I will set them down, and put a man into possession;" and that the tenant had acquiesced. It would be impossible to say that this was not an impounding.

*WIGHTMAN, J.—I think there was an impounding before the tender. Before the passing of stat. 11 G. 2, c. 19, there were inconveniences affecting both landlord and tenant: damage was unavoidably done to goods by their being removed. It was therefore enacted, by sect. 10, that, "it shall and may be lawful to and for any person or persons lawfully taking any distress for any kind of rent, to impound, or otherwise secure the distress so made, of what nature or kind soever it may be, in such place, or on such part of the premises chargeable with the rent, as shall be most fit and convenient for the impounding and securing such distress." Where all the furniture in a house is distrained, it would seem that the most convenient place for securing the distress would be the rooms in which the several articles of furniture respectively were: that would effectually save them from the damage incident to removal. In the present case, the mode of impounding was stringent, as far as regards the taking possession; and it was convenient,

as far as regards the taking. More than that. By an understanding between the parties, the goods of the lodgers were not to be taken away. I think, therefore, that they were impounded in the most convenient place. After that, the tender takes place.

ERLE, J.—I entirely concur, on the ground only that the tenant, by adopting his wife's act, agreed to the goods being left. It is clear that, under the statute, it is possible to impound distrained goods on the premises. We are not at liberty to meddle with the rule of law that a tender, to be effectual, must be made before the impounding. But I do *344] most fully concur in the remark *of Maule, J.,(a) that, generally, it should be enough if the tenant make the tender while the distress remains on the premises, the only object of the distraining being that the landlord should get his rent. As to damage fesant, the law is different.(b)

Rule absolute, for entering verdict for defendant on the second issue.

(a) *Thomas v. Harries*, 1 M. & G. 707 (E. C. L. R. vol. 39).

(b) See *Browne v. Powell*, 4 Bing. 230 (E. C. L. R. vol. 13).

In *Woglam v. Cowperthwait*, 2 Dallas 68, it was said that though the particular provision of the 11th George II. which authorizes the landlord to impound a distress upon the demised premises, was neither directly in force in Pennsylvania, nor incorporated in the Provincial Act of 1772, which was substantially taken from that statute, yet that the usage in that state had

been both before and after the latter act to impound on the premises agreeably to the directions of the English statute.

A tender of the rent to the landlord, or to his bailiff, on the premises, before actual impounding, will make him a trespasser if he proceed: *Hunter v. Le Conte*, 6 Cowen 728; *Hilson v. Blair*, 2 Bailey (S. C.) 168.

VIOLETT v. SYMPSON. Nov. 5.

Action for wilfully and maliciously procuring E., as creditor of plaintiff, to oppose the discharge of plaintiff by the Insolvent Debtors' Court, and for wilfully and maliciously obtaining from E. an affidavit containing, to defendant's knowledge, a false statement, and for using the affidavit in the opposition; by reason of which plaintiff was adjudged to be discharged as soon as he should have been in custody sixteen months from the date of the order at the suit of E.: and that, by reason of the premises, and of a detainer lodged by defendant at the suit of E. while plaintiff continued in custody and before the expiration of the sixteen months, plaintiff did not enjoy the benefit of the Act so soon as he otherwise would, and was detained in prison.

The action was commenced more than six years from the order of the Court and the lodging of the detainer, but within six years of the termination of the imprisonment. Held: that the action was barred by the Statute of Limitations.

THE second count of the declaration stated that plaintiff, being in custody for debt, petitioned for discharge under the Insolvent Debtors' Act; that a vesting order was made, and his schedule filed. That defendant, wilfully and maliciously, caused and procured Richard Edols to oppose plaintiff's discharge, as a creditor, and wilfully and maliciously procured from R. E. an affidavit that defendant's debt to R. E. had been contracted by breach of trust; which was untrue, as defendant knew. That, on the hearing of plaintiff's petition, defendant appeared as

attorney of R. E., and *wilfully and maliciously opposed the discharge of plaintiff on the ground that the debt of plaintiff to R. E. had been contracted by breach of trust, and wilfully and maliciously used the said affidavit in support of the opposition: and the Commissioner, by reason of the said false statements and facts in the affidavit, and not otherwise, held and adjudged that plaintiff had contracted the debt by breach of trust, and adjudged and ordered that plaintiff should be discharged from custody and entitled to the benefit of the Act so soon as he should have been in custody at the suit of R. E. for the period of sixteen calendar months from the time of making the vesting order. That plaintiff, by reason of the premises, and by reason of a detainer, then and whilst he so continued in custody, and long before the expiration of the sixteen months, wilfully and maliciously lodged against him by defendant, at the suit of R. E. and as his attorney, was not discharged from custody, and did not have and enjoy the benefit of the Act so soon as he otherwise would, and was detained and kept in prison for a long space of time, &c.

Plea. That the causes of action did not accrue within six years before the commencement of the suit. Issue thereon.

On the trial, before Coleridge, J., at the last Bristol Assizes, it appeared that the order of the Insolvent Court, mentioned in the declaration, was made on 3d March, 1851; and that the defendant, who was an attorney, had opposed the discharge on behalf of Edols, and, in so doing, had used the affidavit mentioned in the declaration. On the 6th March, 1851, the defendant lodged a detainer on behalf of Edols. The plaintiff, in pursuance of the order, remained in custody for the *sixteen months. No other act of the defendant was proved. [*345 The action was commenced on 8th July, 1857. The learned Judge, referring to *Battley v. Faulkner*, 3 B. & Ald. 288 (E. C. L. R. vol. 5), was of opinion that the action was barred by the statute, and directed a nonsuit.

Montague Smith now moved for a new trial.—There was a continuing damage during all the sixteen months. The defendant must be considered as a party to the detention, and might have been sued in trespass for a detention taking place during any part of that time. The order operated only through the detainer.

Lord CAMPBELL, C. J.—I am of opinion that the nonsuit was right. There was no evidence of any wrong done by the defendant within the six years preceding the commencement of the action. If the defendant could be said to have caused the imprisonment during the time of the detention, that would have been a wrong: but this could not be said. It was for the Judge to adjudicate: he might have adjudicated for a detention during a longer or shorter space of time. The case of *Battley v. Faulkner*, referred to by my brother Coleridge at the trial, is in point.

WIGHTMAN, J.—I am of the same opinion. Whatever wrong was done by the defendant was done more than six years before the commencement of the action.

(ERLE, J., had left the Court.)

COLERIDGE, J., concurred.

Rule refused.

*347] *The LONDON DOCK COMPANY v. JAMES SINNOTT.
Nov. 6.

Action by a Corporation, incorporated as a dock company, by a statute containing no express provisions as to the manner in which the Corporation might be bound by contracts. The action was on an agreement to execute a contract under seal for scavenging the docks for a year. Plea: that the agreement on behalf of the Corporation was by parol only, and not authorized under its seal. On demurrer:

Held, that, though a corporation incorporated for trading purposes has impliedly power to contract by parol for purposes necessary to carry on the trade, the subject of this contract was not of that nature; that the Corporation therefore was not bound; and therefore the defendant was not liable: and the plea was held good.

COUNT: that defendant, in November, 1854, made a tender in writing to the plaintiffs, set out in hæc verba in the count. It commenced: "Specification of contract for scavenging the docks, and for the purchase of old wood hoops, for The London Dock Company." After specifying the terms, it concluded: "the contract to continue from the 30th instant to the 1st December, 1855. The Company to have the power of cancelling the contract upon failure on the part of the contractor to fulfil any of the conditions of the said contract. The contractor, with sufficient sureties, to be approved by the directors, is to enter into a bond for 500*l.* for the due performance of the contract; the expense of the contract and the bond to be borne by the Company; and the names and professions of the persons proposed as sureties to be enclosed in each tender. Tenders to be delivered on Thursday, the 9th November, before twelve o'clock, at London Dock House. Gentlemen, I hereby engage with The London Dock Company to execute a contract on the preceding conditions within fourteen days from the Gentlemen, your obedient servant, James Sinnott, contractor," &c., adding the names, &c., of the proposed sureties.

*348] *Averment: that plaintiffs, within a reasonable time after the making of the tender, and whilst it was in full force, duly accepted the same. "And, although the plaintiffs (except in so far and in respect of such matters and things as they were absolved, exonerated, and discharged by the defendant from doing, performing, or observing) did, performed, and observed, and were ready and willing to do, perform, and observe, all matters and things on their the plaintiffs' part to be done, performed, and observed, and all matters and things happened to entitle the plaintiffs to have the said tender and offer of the defendant performed and fulfilled and observed by him, and to entitle them to maintain this action, of all which premises, so far as notice thereof was necessary to the maintenance of this action, the defendant, before and at the time of the accruing of the said causes of action hereinafter mentioned, had due notice:" Breach: that defendant did not nor would, although a reasonable time and more than fourteen days elapsed for his doing so after the said acceptance of his tender, and before the 1st December, 1854, execute a contract with the plaintiffs on the conditions contained in the said tender, and refused to execute a contract with the plaintiffs on the conditions contained in the said tender.

Plea 4. "The defendant, to so much of the said first count as relates thereto, says that there was no such absolution, exoneration, or discharge as alleged."

Plea 5. To so much of the same count as relates to the non-execution

of the said contract by the defendant, that he did not, after the said making and acceptance of the said tender and offer, and without any default on the part of the plaintiffs, and before the said 1st day of December, decline and refuse as alleged.

*Plea 6. To so much of the same count as relates to the alleged non-execution by the defendant of the said contract, the defendant saith that the alleged acceptance of the plaintiffs therein was by parol only and not under the seal of the Company; nor was it authorized by them under their seal. [*349]

Plea 7. To so much of the said first count as relates to the alleged non-execution by the defendant of the said contract, the defendant says that no tender or offer of the said contract to the defendant for his execution thereof was ever made by the said Company or waived by the defendant; nor was any request valid in law by them to him made to execute the same.

Demurrer to each of these pleas. Joinder in demurrer.

H. Hawkins now argued for the plaintiffs.—Plea 4 is not an issuable plea. [Per CURIAM.—It is difficult to give it any meaning; but it is a traverse of an averment in the count, which, if not traversable, as it probably is not, should not be there. The proper course is to strike out both the averment in the count and the plea traversing it, without costs on either side. This was accordingly done by consent.] Pleas 5 and 7 raise in effect the same question. The breach is that the defendant did not execute a contract; and the pleas only show he did not refuse to execute it. [WIGHTMAN, J.—There is nothing on this record to show that a contract was ever offered by the plaintiffs, or that the offer of one was waived by the defendant. Was the defendant bound to prepare the contract? Lord CAMPBELL, C. J.—These two pleas are clearly good.] Plea 6 proceeds on the supposition that a corporation cannot bind itself by parol; but that is a *mistake: *Henderson v. Australian Royal Steam Navigation Company*, 5 E. & B. 409 [*350 (E. C. L. R. vol. 85)]; *Reuter v. Electric Telegraph Company*, 6 E. & B. 341 (E. C. L. R. vol. 88). [ERLE J.—In the House of Lords, in *Ernest v. Nicholls*, 6 H. L. Ca. 401, 418, very recently Lord Wensleydale took occasion to express his dissent from the principle of the decision in those cases; as far, at least, as regarded corporations created by Royal Charter, though for commercial purposes. The present Corporation is created by an Act of which we must take judicial notice; (a) but I suppose there is nothing in that Act to give the Company any special powers to make contracts by parol?] There are not any special provisions in the Act; the plaintiffs rely upon the general law. What Lord Wensleydale said in *Ernest v. Nicholls*, 6 H. L. Ca. 401, 418, was no part of the decision of the House of Lords. [Lord CAMPBELL, C. J.—That is so; and therefore, though a weighty authority entitled to great respect, it is not binding on this Court as the decision of the House of Lords on the point would be.]

Raymond, contrà.—It cannot be said to be necessary for the carrying on of the business of the Corporation, that there should be power to make a binding parol agreement to execute a contract under seal. It would be much better that the whole should remain in negotiation till

(a) Stat. 9 G. 4, c. cxvi. (Local and personal, public): "To consolidate and amend the several Acts for making the London docks."

the contract is complete, and that then the contract should be sealed at once.

H. Hawkins was heard in reply.

Cur. adv. vult.

*351] *Lord CAMPBELL, C. J., on a subsequent day in this Term (November 21st), delivered judgment.

On the argument of this case, all the pleas demurred to were disposed of except the 6th, pleaded to the non-execution by the defendant of a contract, according to the conditions in the specification, "that the alleged acceptance of the plaintiffs therein was by parol only, and not under the seal of the Company; nor was it authorized by them under their seal." In support of this plea it was contended before us that a corporation constituted as this is for the purposes of carrying on a particular trade cannot enter into binding contracts for carrying on that trade except under the corporation seal, and that the cases in which this Court has held the contrary must be considered as overruled by the late decision in the House of Lords of *Ernest v. Nicholls*, 6 H. L. Ca. 401. By what is decided in that case of course we are bound; and we may add that we should have entirely concurred in that decision; for, although a trading corporation may have power to enter into a binding contract without seal to carry on the trade for which it is constituted, a parol contract to sell the business of the Company and to put an end to its trading must be void. According to the printed report of that case a noble and learned Lord (for whom we have all the most sincere respect), obiter, observed that he disapproved of the decisions of this Court upon this subject: but he himself said: "It is quite unnecessary to discuss this point now, because this is not a question about goods supplied, or services performed in the way of trade in the ordinary course, but a question as to a special contract to do the very *unusual thing of purchasing by one Company the trade of another." *352] We therefore think that we are not prevented by this case from still adhering to the doctrine upon this subject which we had propounded. But, consistently with that doctrine, it appears to us that in this case the 6th plea is a good bar to the action. The contract is not of a mercantile nature; it is not with a customer of the Company; it is not of a character which creates an impossibility that it should be under seal, as becoming party to a bill of exchange: on the contrary, such a contract may more conveniently be under seal than by parol. Therefore, we do think that no power to enter into such a contract by parol is conferred upon the Corporation of the London Docks, and that the plaintiffs do not bring themselves within any of the exceptions to the general rule that a corporation aggregate can only be bound by contracts under the seal of the corporation. If the plaintiffs would not have been liable to an action for refusing to prepare a contract according to the conditions of the specification, they cannot maintain an action against the defendant for refusing to execute it, and there would have been a good defence on Non assumpsit.

Judgment for the defendant.

Although in a few of the earlier cases, the common law rule which denied even to trading corporations the power to contract, except for the most trivial purposes, otherwise than under the corporate seal, was followed (See *Breckbill v. Turnpike Company*, 3 Dallas 496; *Frankfort Bank v. Anderson*, 3 Marshall 1; *Hughes v. Bank of Somerset*, 5 Litt. 14); the opposite

is now firmly and universally established in the jurisprudence of the United States. It is held that the acts and contracts of a corporation may be proved solely by a vote of its members or directors, whether written or unwritten; and that it may be bound either by its express promises, or by those implied from its own acts or those of its agents within the scope of their authority, as in the case of private individuals: *Bank of Columbia v. Patterson*, 7 Cranch 306; *Bank U. S. v. Dandridge*, 12 Wheaton 68; *Porter v. Androscoggin & Kennebec R. R.*, 37 Maine 349; *Eastman v. Cove Bank*, 1 N. H. 26; *Gassett v. Andover*, 21 Verm. 343; *Hayden v. Middlesex Turnpike Co.*, 10 Mass. 401; *Bulkley v.*

Darby Fishing Co., 2 Conn. 256; *Clark v. School Dist. No. 7*, 3 Rhode Isl. 199; *Dunn v. St. Andrew's Church*, 14 Johns. (N. Y.) 118; *Chestnut Hill Turnpike Co. v. Rutter*, 4 Serg. & R. (Penna.) 6; *Comm. v. Cullen*, 13 Penna. St. 183; *Baptist Church v. Mulford*, 3 Halst. (N. J.) 182; *Elyaville Manufact. Co. v. Okisko*, 5 Maryl. 152; *Legrand v. Hampden Sidney College*, 5 Munf. (Va.) 324; *Planters' Bank v. Bivingsville Cotton Co.*, 10 Rich. (S. C.) 95; *Muir v. Canal Co.*, 8 Dana (Ky.) 161; *Everett v. U. S.*, 6 Porter (Alab.) 166; *Ryan v. Dunlap*, 17 Illinois 70; *City of Detroit v. Jackson*, 1 Dougl. (Mich.) 106; *San Antonio v. Lewis*, 9 Texas 69.

***HENRY WESTON ELDER v. JOHN BEAUMONT the Elder and JOHN BEAUMONT the Younger. Nov. 6. [*353]**

Action on a covenant by a debtor to pay the premiums on a policy of insurance on the life of the debtor, which was assigned to the plaintiff as a security for his debt. Plea, bankruptcy and certificate of the defendant. New assignment, that the action was for non-payment of a premium due after the certificate. Plea to the new assignment, on equitable grounds, that plaintiff proved part of the debt under the bankruptcy, and elected to take the benefit of the petition in respect of the debt. Demurrer and issue. On the trial it appeared that plaintiff proved the balance of the debt, but expressly reserved the sum secured by the policy. Held, that the election to take the benefit of the petition for the whole debt was not an inference of law from the proof of part. That the averment in the plea must be understood as of an election in fact; therefore the plea was good, but not proved. The defendant had judgment on the demurrer; and the plaintiff had the verdict.

COUNT: that by deed, dated 21st July, 1854, made between the defendants of the one part and the plaintiff of the other part, after reciting that John Beaumont the elder was indebted to the plaintiff in the sum of 1921*l.* 6*s.* 8*d.*, and John Beaumont the younger was also indebted to the plaintiff in the sum of 1081*l.* 1*s.*, that, for the better securing the repayment of 1000*l.*, part of the first-mentioned debt, the plaintiff, on the 2d January, 1853, effected an insurance on the life of the said John Beaumont the elder in The Argus Life Assurance Company in the sum of 1000*l.*; and the said policy was then still subsisting; and further reciting that it had been agreed between all the said parties thereto that the said several debts amounting together to 3002*l.* 7*s.* 8*d.* should thenceforth be considered as one debt, and that the defendants should be and become jointly and severally liable to pay the same; the defendants jointly and severally covenanted with the plaintiff that defendants, or their respective executors, should pay the plaintiff the sum of 3002*l.* 7*s.* 8*d.*, together with interest at 5*l.* per cent. per annum,

by the instalments, that is to say, the sum of 75*l.* 1*s.* for interest on the *354] said principal sum on *the 31st December then next, the further sum of 75*l.* 1*s.* for interest on the 30th June then next, and thencefore should and would pay interest at the rate aforesaid by half-yearly instalments on the 31st December and the 30th June in every year on the said principal sum or on so much thereof as should from time to time remain due. And also should and would, in addition to the payment of such interest, pay to the plaintiff, his executors or administrators, the sum of 25*l.* on the 30th June and the 31st December in every year, on account and in part payment of the said principal sum, until the whole thereof be fully paid; the first instalment of 25*l.* on account of principal to become due and payable on the 31st December, 1855; and, in default of payment of any or either of the instalments above mentioned or any part thereof for the space of twenty-one days next after any of the days hereinbefore appointed for payment thereof, then and in that case the whole sum then remaining unpaid, together with interest thereon, should be considered immediately due and payable. And defendants jointly and severally further covenanted that they would, on or before the 2d January, 1855, and thenceforth during the life of the defendant John Beaumont the elder, well, truly, and punctually pay the annual and other premiums that should, at any time after the execution of the said deed during the life of the said John Beaumont the elder, become due and payable upon or in respect of the said policy of insurance so effected on the life of the said defendant John Beaumont the elder thereinbefore mentioned, so that his life might be continually insured in the sum of 1000*l.*; and also should and would, on request, produce, and show to the plaintiff the receipt for the premiums *355] for the current *year. And also, at the request of the plaintiff, his executors or administrators, John Beaumont the elder would attend at any Life Assurance Office in London or Westminster for the purpose of effecting an insurance in the same sum in lieu of the then existing policy; and in that case the defendants, their executors or administrators, some or one of them, would well and truly pay the annual and other premiums that should become due and payable on any such substituted policy during the life of John Beaumont the elder. Averment of general performance by the plaintiff. First breach: that a premium was due and payable upon the said policy so effected as aforesaid, and the time for the payment thereof elapsed before this suit, whereof the defendants had notice, but did not pay the same, whereby the plaintiff was forced to pay the same in order to keep the life of the defendant John Beaumont the elder insured as aforesaid. Further breach: that, although plaintiff requested the defendants to produce and show to the plaintiff the receipt for the premium for the then current year, it was not shown.

Pleas of Beaumont the elder. 1. Bankruptcy of the two defendants on their own petition, and certificate of this defendant. 2. A denial of the breach. Issue thereon.

New assignment to first plea: that plaintiff sues, not for breaches of the said covenants committed before the filing of the declaration of insolvency, but for the non-payment by the defendants of a premium which became and was due and payable upon the said policy, as mentioned, after the allowance of the said certificate of conformity, and

before this suit, and whilst part of the sum of 3002*l.* 7*s.* 8*d.* mentioned in the said deed, to wit, 1000*l.*, remained unpaid, and for the non-production *by the defendants of a receipt for the said premiums [*356 lastly hereinbefore mentioned.

Plea by John Beaumont the elder to the new assignment, for a defence on equitable grounds: that, after the making of the said deed, and the filing of the petition for adjudication, and before this suit, and before any part of the said premium became or was due or payable, or either of the said breaches of covenant was committed, the plaintiff proved a great part of the debt or sum of 3002*l.* 7*s.* 8*d.* under the said petition, to wit, the sum of 2002*l.* 7*s.* 8*d.*, and elected to take the benefit of the said petition with respect to the said debt or sum of 3002*l.* 7*s.* 8*d.*

Demurrer. Joinder in demurrer. Issue was also taken on the plea.

There were precisely similar pleadings by the other defendant.

On the trial, before Wightman, J., at the London Sittings after Easter Term, 1857, it appeared that the plaintiffs proved on the estate of the bankrupts in the following form: for "2002*l.* 7*s.* 8*d.* upon balance of account after crediting the value of a policy in The Argus Insurance Office for 1000*l.*" Subsequently to the proof, the plaintiff required the defendants to pay the premiums and produce the receipts; which was not done. The learned Judge directed a verdict for the plaintiff, subject to leave to move to enter a verdict on the equitable pleas to the new assignments. *Lush*, in the ensuing Term, obtained a rule Nisi accordingly, on the ground that these pleas were proved. The Court ordered that the rule and the demurrers should come on together.

Edwin James now argued for the plaintiff on the demurrer; and *Edwin James* and *H. Hawkins* showed cause *against the rule.— [*357 The bankruptcy and certificate would be no bar to such an action as this: *Warburg v. Tucker*, 5 E. & B. 384 (E. C. L. R. vol. 85). But it is said that the proof of the balance of the debt operated as an election to take the benefit of the petition with respect to the whole, and bars the whole in equity; though the 1000*l.* secured by the policy is expressly excepted. [WIGHTMAN, J.—But is it not on the demurrer to be taken that the averment in the plea is of an election in fact, and is true?] If so, it was not proved. But it is averred as an inference of law. And there is no such inference of law. The Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), sect. 182, provides that proof should be on election to take the benefit of the petition "with respect to the debt so proved or claimed." Here the debt proved and claimed was 2002*l.* 7*s.* 8*d.*, the balance after giving credit for the 1000*l.*; and it is sought to make that an election as to the 3002*l.* 7*s.* 8*d.*, including the 1000*l.* Besides, the election is not a bar to an action: *Horley v. Greenwood*, 5 B. & Ald. 95 (E. C. L. R. vol. 7).

Lush, *contra*.—This is a plea on equitable grounds. If the debt were paid, it would be unconscientious to sue on the covenant to keep up the policy; and equity would relieve. And proof in bankruptcy is, in equity, equivalent in effect to payment: *Ex parte Hornby*, Buck 351. [Lord CAMPBELL, C. J.—It is scarcely denied that proof of the whole debt might have operated as an equitable defence.] Proof of any part of a debt is equivalent as an election to prove the whole: *Ex parte Dickson*, 1 Rose 98, *Ex parte Schlesinger*, 2 G. & J. 392. [WIGHTMAN, J.—Those *were instances of causes of action which, if [*358 there was no proof, would be barred by the certificate. But the

present cause of action would not be so barred, according to Warburg v. Tucker, 5 E. & B. 384 (E. C. L. R. vol. 85). Lord CAMPBELL, C. J.—If the principal debt is gone, there would be an equity on that ground to prevent the enforcement of the security, though the security was not barred at law. But what prejudice does the estate receive in consequence of the proof in this manner? ERLE, J.—Having proved for the 2000*l.* only, the plaintiff cannot receive dividends on more than that sum. At all events, he cannot obtain the dividends on the 1000*l.* not included in this proof without special leave of the Court of Bankruptcy, which would not be granted except on the terms that the dividends already paid should not be disturbed. So, if he has abandoned his right to have this policy kept up, he has done so without receiving the benefit of the proof in respect of it.] That is not a matter over which the bankrupts had any control.

Edwin James was heard in reply on the demurrer.

Cur. adv. vult.

Lord CAMPBELL, C. J., on a subsequent day in this Term (November 11th), delivered judgment.

We are of opinion that upon the demurrer there ought to be judgment for the defendants. The equitable plea to the new assignment avers that, before any part of the 49*l.* 12*s.* 6*d.* became due, the plaintiff proved under the petition a part of the debt to be secured by the policy, and elected to take the benefit of the petition with respect to the whole debt. If the plaintiff had done anything which amounted to an election to *359] take the *benefit of the petition for the whole debt before the premiums on the policy became due, there seems no doubt that this would be an equitable answer; for in that case the whole debt must be considered as paid; and, after payment of the whole debt, it would be unjust and against conscience to sue upon the covenant to pay the premiums on the policy intended to secure the debt. The plaintiff contends that this allegation in the plea is merely put by way of inference of law from the fact of proving for a part. But, if that fact affords no such legal inference (and we believe that it does not), we see no sufficient reason for saying that it does not amount to a distinct allegation that, in fact, the plaintiff had done some additional act which operates as an election to take the benefit of the petition for the whole debt. The plea may thus be considered sufficient, the defendants undertaking to prove that the plaintiff did something which establishes the truth of the alleged election beyond the proof of a part of the debt. But, upon the same reasoning, the verdict upon the issue of fact tried must be entered for the plaintiff. At the trial no evidence was offered by the defendants to support the plea beyond the fact of the plaintiff's proof for a part of the debt; and no decision or principle was adduced to show that a creditor, with a security which inadequately covers his debt, may not be permitted to prove for the part which is uncovered, and retain the benefit of his security for the residue.

Therefore there will be judgment for the defendants on the demurrer: and the rule to enter a verdict for the defendants on the issue will be discharged.

Judgment for defendants on the demurrers.
Rule for entering verdict discharged.

*The QUEEN v. STEWART.

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The QUEEN v. STAINSBY.

The QUEEN v. BRETON.

The QUEEN v. FOSTER.

The QUEEN v. STEWART. Nov. 7.

A storekeeper or porter employed by the Crown in the public service, occupying premises belonging to the Crown for the purpose of performing such service, is not rateable in respect of such occupation, although it constitutes part of the emolument of his office. But, if he have an occupation of more than is reasonably necessary for the performance of such service, he is rateable in respect of the excess, and of no more. In estimating the question of excess, the station of the party employed should be taken into consideration; and reasonable accommodation for his family will not constitute an excess. An excess which is merely trifling ought to be disregarded.

The same rule applies to the governor of a garrison town, occupying Crown property within the town, though he is also commanding officer of a military district much more extensive than the town.

The rule is applicable, though none of the duties are executed in the premises occupied.

On appeal by Alexander Stewart against a rate, made 13th July, 1855, for the relief of the poor of the parish of Portsmouth, within the borough of Portsmouth, in Hampshire, the Recorder confirmed the rate, subject to the opinion of this Court on a case.

The rate was as follows.

Name of Occupier.	Name of Owner.	Description of Property rated.	Name or situation of Property.	Estimated gross rental.	Rateable value.	Rate at 1s. 6d. in the pound.
Alexander Stewart.	The Crown.	House & only in this parish.	Old Gun Wharf.	£53 10s.	£48.	£3 12s.

*The case stated as follows.

The Old Gun Wharf, mentioned in the assessment, is the property of the Crown; and it has always been used by the Crown for the purposes of an arsenal and depository for ordnance and military and naval stores, and as a wharf for embarking and disembarking such stores on board of and from ships of war and transport and other vessels. It consists of a large yard and wharf, partly in the parish of Portsmouth and partly in the adjoining parish of Portsea, and contains in extent about six acres. One side of it abuts upon the sea, at the entrance of the harbour of Portsmouth, to which that side is open, to admit of vessels coming up and lying alongside of the wharf for the more convenient embarking and disembarking of stores. On all other sides it is enclosed or fenced with a high wall. It has one principal entrance only; and that is by a gateway on the land side. The gate is closed against the public, both by night and by day, and is kept by watchmen by night and by porters by day, whose duty it is to exclude strangers and others of the public having no business within the wharf; no person having any right or permission to go in except upon being passed in at the gate by the person on duty there, and who, in the performance of that duty, acts under the directions and orders of his superior officers in the wharf.

The side abutting on the sea and the interior of the wharf are guarded by military sentinels.

The Old Gun Wharf was formerly under the superintendence and management of the Board of Ordnance, and is now under the charge of the War Office. It contains several buildings, some formerly used as barracks for gunners and other soldiers in the artillery, and others *362] *as houses and quarters for their officers: but, for many years, the duties before performed by them have been executed by artificers and labourers under the direction and control of civil officers; and the various buildings are now used as storehouses and as offices and residences for the use of the officers so employed in the wharf. Gun-carriages, guns, shot, shell, arms, and warlike stores of all descriptions, for both sea and land service, and materials for fortification and garrison service, are kept there; some of which, as guns and shot, are kept in the open air, and others are stored in the storehouses within the wharf. These stores are placed by the Government in the immediate charge of certain officers appointed under the Crown, pursuant to an order in council of 1st July, 1716, by which the Board of Ordnance were empowered and required to alter their then existing regulations, and to appoint such officers as should be thought necessary for the more effectually carrying on the service of that office. Those officers are now nine in number; all of whom (except three of the clerks) are required to reside within the wharf in houses or parts of houses which are respectively assigned and appropriated to them for that purpose: and a porter and a foreman are also appointed to reside in lodges respectively assigned to them at the gateway for the better performance of their duties at the gate or entrance of the wharf. The Gun Wharf is used for public purposes only. The appellant is the storekeeper of Her Majesty's gun wharf at Portsmouth, which is a public office under the Crown. He was appointed thereto by the then Master-General of the Board of Ordnance in the month of May, 1845. His salary is 700*l.* a year, which is paid out of the public moneys; and he is the chief or *363] head officer of the establishment. *As the storekeeper, he has the charge of all the stores; and he is accountable for them to the War Office: and as such principal officer, he is also charged with the receipt and delivery, issue and return, of all stores at that wharf, and with the embarkation and disembarkation of stores: and the accounts are kept, and all the other public duties of the establishment are performed, under his orders and directions. He has no other duty or employment than the public duties imposed upon him by the War Department, to which the whole of his time and services are devoted: and he is liable to be removed to any other place or station at any time by the Crown. The house which is the subject of the foregoing assessment is the property of the Crown. It is one of five houses situated within the walls of the Gun Wharf, and was assigned to the appellant as his residence on his appointment to his present office in May, 1845. The offices where the public duties of the establishment are conducted are at some distance from the appellant's residence, in another part of the Gun Wharf. The appellant's house is separated from the armoury by a passage. It consists, with its outbuildings, of sixteen rooms, which are thus appropriated. On the ground floor there is a sitting-room and a dining-room; on the first floor a drawing-room and three bed-rooms;

and on the second floor there are two bed-rooms, one of which is never used by the present appellant. Adjoining and communicating with the house is a building containing on the ground floor two rooms, one of which is used as a kitchen and the other serves as a storeroom. Above these are two bed-rooms, in which the appellant's two servants sleep. There is a bath-room, pantry, and scullery, brewhouse, covered passage, coal and wood *houses, and cow-house. Behind the house there is a garden of about half an acre in extent, which produces [*364 flowers, fruit, and vegetables, the fruit and vegetables being consumed by the appellant. In it is a green-house, at present unused. There is also a building called a dairy; and there is a stable with two stalls, a coach-house, and harness-room. The appellant does not keep either horses or carriages. The appellant has a nephew residing with him, and keeps two servants in the house, and employs two others for occasional service, but has neither wife nor family. There is considerably more accommodation than the appellant requires for his personal use, or for the discharge of the necessary duties of his office. The appellant has no option or discretion in respect of the house so assigned to him: and his predecessor in his present office, who was a married man, used the whole house for the accommodation of himself and his family. It is necessary for the safety of the stores, and for the proper discharge of his duties, that he should reside in the Gun Wharf: and the regulations of the service require the appellant, the deputy-storekeeper, and four of the clerks, to reside within the walls. The appellant pays no rent for the said house and premises, which he lives in by the direction of the Crown: but the use of the house and premises forms part of the emoluments of his appointment.

The house and premises have always hitherto been rated to the poor-rate, and to the inhabited house duty, and assessed and other taxes: and the rates and taxes have been paid by the appellant. The appellant is liable to be removed from the house at any time.

The question for the opinion of this Court is, Whether the appellant is liable to be rated in respect of the *occupation of the said house and premises, or of any or what portion thereof, under the circumstances above stated. If the Court should be of opinion that the appellant is not liable to be rated, the rate is to be amended by striking out the said assessment. And, if the Court should be of opinion that the appellant is liable to be rated for the whole or any portion thereof, the assessment is to stand, or be reduced to such sum as the Court may think fit; or the amount of such rate is to be adjusted between the parties according to the portion thereof which the Court shall be of opinion ought to be rated.

Hugh Hill and W. M. Cooke, in support of the order of Sessions.—The appellant is liable to be rated as occupier, though he pays for the right to occupy by the service which he performs to the Crown: *Rex v. Mathews*, Cald. 1; *Rex v. Terrott*, 3 East 506. The principles upon which the law in this respect rests are shown in *Gambier v. Overseers of Lydeard*, 3 E. & B. 346 (E. C. L. R. vol. 77); and the latest case is that of the *Oxford Rate*, ante, p. 184. It may be fairly contended that, if there be any occupation beneficial to the occupier, he is rateable in respect of the whole; but, at the least, he is rateable in respect of the occupation of all not essential to the performance of his duties. On the other side,

reliance may be placed on a case decided in 1855; *Regina v. Fuller*.(a) *366] That was decided under the *Militia Acts, 17 & 18 Vict. c. 105, and c. 109. But, though, under those Acts, the party, so far

(a) *THE QUEEN v. FULLER. May 26, 1855.*

An adjutant, having charge of militia stores under stat. 17 & 18 Vict. c. 109, s. 4, and occupying, for that purpose, premises provided for such stores under stat. 17 & 18 Vict. c. 105, s. 2, is rateable in respect of such occupation so far only as he has an use of them exceeding what is necessary for himself and family, taking into account his station in life.

The appellant, Captain William Fuller, was rated as occupier of a house and stable, of which the rate described the owner to be "Her Majesty's ordnance." The sessions confirmed the order, subject to a case, by which it appeared that the rate was laid under stat. 26 G. 2, c. 99, "For the better relief and employment of the poor, and for enlightening the streets, passages, and open places within the city of Chichester, and several places adjoining thereto, and the close within the said city." The case set out parts of the statute, which united several parishes, &c., into one district for the relief of the poor, and constituted a corporation of guardians for the management of the poor, giving them power to rate and assess by taxation of every inhabitant, &c., and of every occupier of land, tenement, &c., for the maintenance and employment of the poor; with right of appeal to the Quarter Sessions. The captain was captain and adjutant of the West Sussex militia, "and, as such, occupied the premises" rated "as a place provided for the keeping of the militia stores of the regiment." The case referred to stat. 17 & 18 Vict. c. 105, "To amend the laws relating to the militia in England and Wales:" sect. 2 of which refers to certain Acts, and gives power to the justices of the county to purchase or hire buildings or premises for the purpose of keeping therein the arms, &c., and other stores belonging to any regiment, battalion, or corps of militia, or to enlarge, alter, or improve any buildings or premises already purchased or hired: "provided always, that the place to be so hired, purchased, built, altered, or enlarged shall contain an orderly and guard room and magazine, and a sufficient yard or place wherein the men may be mustered for the issue and return of such arms, accoutrements, clothing, and other stores;" and it further enacts that "no place provided for the keeping of militia stores under this or the recited Acts, nor any buildings or premises appurtenant thereto, shall be liable to be assessed to any county, borough, parochial, or other local rates or assessments." The case stated that the premises were vested in trust for the justices as a place for keeping therein the arms, accoutrements, clothing, and other stores belonging to the said regiment of militia when not embodied, and for other the purposes (if any) required by the Act or Acts of Parliament relating to Her Majesty's militia. The case then stated circumstances showing the application of the premises to the purposes of keeping the militia stores, and described them as comprehending sitting-rooms, bed-rooms, offices, gardens, carriage-house, and stables. The appellant, with his family, resided on the premises as adjutant of the regiment; and they were his official residence. The permanent staff of the regiment assembled on the premises; and the buglers of the regiment practised therein. The premises did not contain an orderly and guard room, nor a magazine, nor a sufficient yard or place wherein the men of the regiment might be mustered for the issue and return of the arms, &c. The stable and coach-house and yard were used and occupied, by the permission of the appellant, but gratuitously, and without paying any rent for the same, by one Thomas Chaturin.

Willers, in support of the order of Sessions.—The respondents support the rating only as to the house and stable. It is manifest that the appellant has an occupation of these beyond the mere purposes of his public charge, and therefore beneficially. [BRLIN, J.—I should think that, if the premises were bona fide taken by him for those purposes, any little excess of use would be covered by the Act.] No doubt, under sect. 4 of stat. 17 & 18 Vict. c. 109, the appellant has the charge of the arms and other stores. In *Gambier v. Overseers of Lydford*, 3 E. & B. 346 (E. C. L. R. vol. 72), it was conceded by counsel, and agreed by the Court, that, so far as the prison "is occupied by officers exclusively for the performance of their duties, they cannot be rateable: and this includes reasonable accommodation for their families according to their station in life." But both from that case and from *Rex v. Terrott*, 3 East 506, it appears that the office here must be rated for all beyond that. Here it is clear that the stable was not necessary for the performance of the appellant's duties; for he has allowed the use of them to another.

J. J. Johnson (with whom was *Cornor*), contra.—The case shows that the appellant was not occupier of the stable at all: Chaturin was tenant at sufferance. [COLERIDGE, J.—Why more so than a servant would be?] What benefit does the appellant derive from the stable? [COLERIDGE, J.—Suppose he put his own race-horses into it.] He has made no use of it for his own purposes. At some time the stables will no doubt be required for horses used in the militia service: when they are not so used, and are left empty, how can it be said that the appellant,

as he occupied *for a public purpose, was held not rateable, it was held that he was rateable if there were any excess in the *occupation beyond what the public purposes required: and here such excess is expressly found. If it be said *that here the appellant had no option, but was compelled to occupy, the same fact appeared in *Gambier v. Overseers of Lydford*, 3 E. & B. 346 (E. C. L. R. vol. 72), in instances where the parties were held rateable. [367 [368 [369

Welsby, Poulden, and C. B. Russell, contra.—It cannot be said here that the appellant has any occupation beyond that required for public purposes. He is required to reside in parts of the house: and it cannot signify that he does not want the rest of the house. [WIGHTMAN, J.—He might have used the rest if he had liked.] So might the adjutant, in *Regina v. Fuller*, ante, p. 365, note (a), have used the coach-house and stable; yet it was held that he could not be rated in respect of them unless he so used them in fact. [ERLE, J.—It would seem strange if he was rateable or not, by turns, according as he had a family with him or not.] It would. The nephew is a part of the family. When it once appears that there is occupation for a public purpose, the burthen

by allowing another person to occupy them, acquires a beneficial occupation? [He was then stopped by the Court.]

LORD CAMPBELL, C. J.—The statement as to the stable does not enable us to say whether it is properly assessed. If Chaturin be in occupation, Fuller of course is not so. But, if Fuller allows Chaturin, as his friend, to use the stable, then Fuller would be rateable for it; because, though it was provided for the purposes of the militia, yet Fuller would become rateable by applying it to another purpose. If he makes no use of what is provided for the purposes of the militia, he is not an occupier of it, though there is no other occupier. If he had merely his own horse there, which he wanted as adjutant, he would not be rateable; if he had more, he would be rateable. What is merely occupied by stores is exempted from rate under stat. 43 Eliz. c. 2. As to the official house occupied by the adjutant, he is not rateable in respect of that: we must assume that he necessarily resides there; and if so, he is exempted in respect both of his personal occupation and of that by his family. It would be strange to say that the governor of a gaol was exempt to this extent, but an adjutant was to be treated as a man without a family. The result is that we cannot, in the present state of the case, give a judgment as to the coach-house and stable; and that, as to the rest, the rate must be quashed.

COLLINGE, J.—The principle is that a house in general, whatever we may think as to particular portions of it, does not render a man rateable who resides in it only for public purposes, and that necessarily. But, if he has more accommodation than is wanted for such residence, taking into consideration his position in life, he is rateable for such excess. It would be a great hardship if such a resident, reducing his expenses on account of the smallness of his income, and then occupying a part only of the premises, were to be liable to a rate in respect of the part which he did not occupy or want. Had the adjutant, in this case, not having a carriage or a horse, locked up the coach-house and stable, declaring that he had nothing to do with them, he might well say that he was not rateable in respect of those. But it is clear that, if he used them for the purpose of allowing a friend to have the convenience, he would be rateable for that excess beyond the accommodation necessary for himself. But, under the statute of Elizabeth, a trifling excess should not be taken into consideration: and stat. 17 & 18 Vict. c. 105, s. 2, clearly does not limit the exemption to the case of actual personal occupation, but applies it to "premises appurtenant." That, of course, would not cover any considerable excess.

ERLE, J.—I also am of opinion that the premises provided for keeping the militia stores, and all appurtenant thereto, are exempted. The main contention here is that the appellant occupies more than is sufficient for official purposes. *Gambier v. Overseers of Lydford*, 3 E. & B. 346 (E. C. L. R. vol. 72), shows that we may assume officers, who have an official right to occupy, to be entitled to reasonable occupation by their families: they are not required to be single men.

CROWDER, J.—I am of the same opinion. The only real question is as to the coach-house and stables: the appellant is rateable in respect of them so far only as he occupies them for purposes not public.

Case sent back to Sessions to be restated as to the coach-house and stable; rate quashed as to rest of the premises.

See *Regina v. Jay*, post, p. 469.

of proof is no longer on the party seeking to show an exemption from rate, but on the party seeking to get rid of the exemption. The question is, as put in the judgment in the Oxford Rate, *antè*, p. 184, and in *Holford v. Copeland*, 3 B. & P. 129, whether there is a private enjoyment; and none can be shown here beyond what appeared in the case last mentioned, which related to the rooms of the Masters in Chancery.

The Court suspended their judgment till the close of the argument in *Regina v. Stainsby*.(a)

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*The QUEEN v. STAINSBY.

ON appeal by Edward Stainsby, against the same rate, the Recorder confirmed the rate, subject to the opinion of this Court on a case.

The rate was as follows.

Name of Occupier.	Name of Owner.	Description of Property rated.	Name or situation of Property.	Estimated gross rental.	Rateable value.	Rate at 1s. 6d. in the pound.
Edward Stainsby.	Crown.	House.	Old Gun Wharf.	£11 10s.	£10 10s.	15s. 9d.

The case stated facts, as in the preceding case, from the words "The Old Gun Wharf" (p. 361, l. 2) to the words "public purposes only" (p. 362, l. 27); and proceeded as follows.

The appellant is the porter of the principal entrance of Her Majesty's Gun Wharf at Portsmouth; and he resides in the lodge, a small house close by the gate, where his duties lie. It was assigned to him as his residence on his appointment to his present office, in the month of July, 1845. His salary is one guinea per week, which is paid out of the public moneys. The house is the property of the Crown, and is situated within the walls of the Gun Wharf. It consists of a kitchen and a small pantry on the basement floor, and a parlour and two bed-rooms on the ground floor. Above are two small attics; and adjoining the premises is a wash-house. The duties of the appellant require his constant presence both by day and by night, not only within the *wharf, but close to its principal gate or entrance. He has no other duty or employment than the public duties imposed upon him by the War Department, to which the whole of his time and services are devoted: and he is liable to be removed to any other place or station, and to be dismissed from his office in the Gun Wharf, at any time. The appellant has a wife and a nephew who reside with him. The whole house is more than is required for the personal use of the appellant, or for the discharge of the necessary duties of his office. He has no option or discretion in respect of the said house, but lives in it in obedience to the commands of the Crown, whose servant he is. It is necessary, for the safety of the Gun Wharf and of the stores contained in it, and for the proper discharge of his duties, that he should reside within the walls of the wharf and close by its principal gate. The appellant pays no rent

(a) There were two other cases, *The Queen* against *Edwards* and *The Queen* against *Lake*, which, it was admitted, were not distinguishable from *Regina v. Stewart*, and as to which, therefore, no argument took place.

for the said house; but the same is considered as a portion of the emoluments of his office; and the premises have always hitherto been assessed to the poor's-rate; and the rates have been paid by appellant.

The question was stated for the Court as before, *mutatis mutandis*.

Hugh Hill and *W. M. Cooke*, in support of the order of Sessions, referred to *Rex v. Hurdis*, 3 T. R. 497, where it was held that the statement, in a case, of a gunner being the occupier of a battery house, the property of the Crown, was conclusive in favour of the rateability; and they insisted that the present case was not distinguishable from *Rex v. Mathews*, Cald. 1.

**Welsby*, *Poulden*, and *C. B. Russell*, *contra*.—Although it is found that the house has more accommodation than is necessary [*372 for the performance of the duty, it does not appear that the appellant has any personal occupation with respect to the excess.

Lord CAMPBELL, C. J.—We need not repeat the principle, so often acted upon, of rating solely as to the excess. We are then to apply it to these cases. *Mr. Hill* appeared, at first, to be disposed to contend that, if there were any excess, the party became rateable in respect of the whole. That view cannot be supported. So far as the occupation is reasonably necessary for the performance of the public duty, such occupation is not the subject of rate. But *Rex v. Terrott*, 3 East 506, shows that, in respect of any occupation exceeding that, the occupier is rateable to the extent of the excess. Here it is found, in the case of the storekeeper, that there is considerably more accommodation than he requires for his personal use in the necessary discharge of his public duties; and for that he must be rated. In the case of the porter, it is found that there is more accommodation than he so requires: if that be a substantial excess, he must be rated for such excess. But the rates cannot stand as at present; for they are laid indiscriminately in respect of the whole. The cases must therefore go down to Sessions again; and the Sessions must regulate the rate on the principle that the appellants are to be assessed in respect of all occupation exceeding that which is reasonably wanted for the performance of the duty.

*COLERIDGE, J.—I am of the same opinion. The finding that [*373 the property rated exceeds what is wanted for the performance of the duty concludes the Court as to its decision, which must stand on the well-known principle that, in respect of all exceeding what is so wanted, the occupier must be understood to be occupying beneficially for his own purposes. He may, in point of law, be considered as filling two characters. In the case of the *Oxford Rate*, ante, p. 184, the professors might be considered in two characters, that of professors and that of individuals. In the former character they were not rateable for their use of the property; in the latter character they were rateable. All this is quite familiar. I was much surprised to find that *Mr. Hill* was inclined to contend that, under such circumstances, the occupier is rateable for the whole. It is obvious that the greatest injustice would be done, if that were so, in cases where the occupation is compulsory. The question which we have now to determine is what the finding of the Recorder means. If, by "personal use," he meant only room to lie down, sleep, sit, and feed, I should be sorry to rest on such a finding. It must be understood that a person of a particular station will be required for such an office; and such a person cannot be found unless

you give him an accommodation fitting for his station. The parish, I agree, is not bound by the judgment of the Crown: but the Sessions will do wrong if they do not take that into their consideration. To say that, because a serjeant could watch the stores and keep the accounts, the country, if it think the duties better fitted for a person of higher station, cannot place such a person in the office, and accommodate him according to his station, without making him rateable for such accommodation, seems to me not reasonable; and I cannot agree to such a view. I think that we ought to understand the words "personal use" as referring to what is proper for persons in the particular station.

WIGHTMAN, J.—According to all the cases, an occupier is rateable in respect of whatever is more than he "requires for his personal use, or for the discharge of the necessary duties of his office;" and these are the expressions which the Recorder has used in describing the occupation here.

ERLE, J.—The principle of law is now assented to, that a public officer, occupying property of the Crown for the purpose of the discharge of his public duties, is exempted from rate in respect of such occupation. The question is, to what extent that exemption goes. Different Judges have thrown out the rule as it has struck their own minds: as, here, my Lord says that the exemption extends to such occupation as is reasonably necessary. I agree to that, if I may add that in estimating what is reasonably necessary we should look to the station of the particular functionary. I quite agree with what is said in *Regina v. Fuller*, ante, p. 365, note (a), that, where there is a permanent occupation, an accommodation for a wife and family is not necessarily excessive. It might often be expedient to place a married man in the situation: at all events we ought not to make it necessary that the party should be a bachelor. As to any trifling excess, I cannot but think that what was said in *Regina v. Fuller* is right: and that what can be found nearest, in extent of accommodation, to what is exactly wanted may be reasonably taken; and that any trifling excess is unimportant.

The QUEEN v. BRETON.

ON appeal by Henry William Breton, against the same rate, the Recorder confirmed the rate, subject to the opinion of this Court on a case.

The rate was as follows.

Name of Occupier.	Name of Owner.	Description of Property rated.	Name or situation of Property rated.	Estimated gross rental.	Rateable value.	Rate at 1s 6d in the pound.
General Breton.	The Crown.	House and Stabling.	High Street.	£333 10s.	£300.	£22 10s.

The case stated as follows.

The appellant is a major-general in Her Majesty's army, and, in the year 1855, was appointed and is lieutenant-governor of Portsmouth, and commanding officer of the South Western Military District of England, which comprises the whole of the counties of Hants, including the Isle of

Wight, Wilts, and Dorset, and the city of Chichester, the head quarters of the district where the general and his staff are stationed being at Portsmouth.

The offices of lieutenant-governor of Portsmouth and *general commanding the South West District of England are military [*376 offices held under the Crown. The premises in respect of which the appellant is rated, and which consist of a house, stabling, and coach-house, together with a small plot of ground covered with turf, having a flower border, are situate, the house in the High Street of Portsmouth, and the stabling, coach-house, and grass plot immediately behind and contiguous to it, the coach-house and stabling facing in St. Thomas Street, which runs parallel with High Street. They are the property of the Crown, and have constituted the residence of the appellant's predecessors, the lieutenant-governors of Portsmouth, for some years past. On the appointment of the appellant to his present offices, in the year 1855, the premises in question were assigned to him as a residence provided for him by the Crown whilst holding the two before-mentioned appointments and performing the duties thereof. The house, in which the appellant resides with his family (which includes his daughter and eight servants), consists of four stories. The rooms are thus appropriated. There are two attics, which are very little used by the appellant, except occasionally as a look-out for ships. The second floor consists of a bed-room and dressing-room occupied by the appellant, a bed-room occupied by his daughter, a bed-room and dressing-room occupied by a domestic servant, and two rooms and a dressing-room occupied by the appellant's aid-de-camp. The appellant, as lieutenant-governor of Portsmouth and major-general commanding the district, is bound by the rules of the service to have an aid-de-camp attached to his person: but such aid-de-camp has no right of residence in the appellant's house, and only occupies the above rooms by the permission of the appellant, and at *his request. [*377 The first floor consists of a large drawing-room with folding doors, a small room occupied by a domestic servant, and two bed-rooms and a dressing-room. In these rooms the appellant is in the habit of putting up any visitors of distinction, whether English or foreign, who may be sent by the Government to see the various public works and buildings at Portsmouth. Except for the purpose of entertaining such visitors, which he feels to be a duty incumbent on him from his situation, the appellant would not furnish or use these rooms. His predecessor however, with a much larger family than the appellant, used them indiscriminately with the other rooms in the house for the ordinary purposes of his family: and there is no legal obligation upon the appellant to appropriate these rooms as he has done in fact. The ground floor consists of dining-room with folding doors, store-room, and a room which is used by the appellant as an office for receiving his letters and transacting his own business, as well as for the reception of his staff officers. There is also on this floor a room used as an office by the appellant's aid-de-camp, and also a kitchen and butler's pantry, and a small room occupied as a bed-room. The basement contains servants' hall, bottling-house, wood and coal cellars, and store-rooms. Between the kitchen and stables are a laundry and place for drying. The outer door of the house is under the sole control of the appellant. There is a small garden behind the house, laid out as a grass plot and with a flower border. The stabling contains accommoda-

tion for five horses; and five are kept therein. Three of them belong to the appellant, and two to his aid-de-camp, who keeps his horses in the appellant's stables by the permission and desire of the appellant.

*378] *By the rules of the service, both the appellant is authorized to keep five horses and his aid-de-camp two: and for this number of horses forage is allowed by the Crown. There is a coach-house and a loose box, and a harness-room, and, over a stable, a loft for depositing corn and hay; and there are two sleeping-rooms for grooms. The rate is made for the whole of the above premises.

Adjoining the residence of the appellant, and communicating internally with it by a doorway, is a house called The Brigade Office, used expressly as offices for the performance of the military official public duties of the appellant and the various officers connected with his office and command at Portsmouth; wherein are performed all the brigade duties of the garrison at Portsmouth, of which the appellant, as lieutenant-governor, has the chief command; which duties cannot conveniently be carried on without the appellant's residing close to the brigade office where they are required to be performed. This building has a separate entrance door from the High Street at Portsmouth, and is not rated to the parochial rates and taxes. The appellant receives rather more than 1000*l.* a year by way of salary, and was at first allowed 200*l.* a year (which has lately been reduced to 133*l.* a year), in addition to his salary, by the Crown, in lieu of furniture which he himself provides instead of its being found for him by the Crown according to the regulations of the service, by which the appellant is entitled to furnished quarters, coals and candles.

The appellant pays no rent; but the occupation of the house forms part of the emolument of his appointment. He has never paid any poor's rates, taxes, or *inhabited house duty in respect of the said house and stabling and premises; but the same have been assessed to the poor's rates, inhabited house duty, assessed taxes and other rates; and all such rates, taxes, and duties have been paid by the barrack master of the garrison, and charged by him in his accounts to the Government.

The appellant's duties, as general commanding his District, are performed in all parts of the District: his duties as lieutenant-governor of Portsmouth are confined to the garrison of Portsmouth; which garrison includes the towns of Portsmouth and Portsea: and he has the above residence provided for him by the Government who direct him to occupy it; and without the permission of the Government he could not live elsewhere while holding the above offices.

The house is considerably larger than is required for the personal use of the appellant, or for the discharge of the necessary duties of either or both his appointments. He is liable to be removed from Portsmouth to any other place or station, at any moment, at the pleasure of the Crown.

The question was stated for the Court as before, *mutatis mutandis*.

Hugh Hill and *W. M. Cooke*, in support of the order of Sessions, relied upon the circumstance that the appellant had duties to perform throughout the whole District, so that there was nothing to make it fit, for the performance of his duty, that he should reside on the rated premises rather than in any other part of the District; and they referred to *Gambier v. Overseers of Lydford*, 3 E. & B. 346.

* *Welsby, Poulden, and C. B. Russell*, contra, contended that, as the appellant was required by the Crown to reside in these premises, the fact of his having also duties to perform in the District at large was immaterial. [*380]

Lord CAMPBELL, C. J.—He certainly has duties to perform over an extensive area: and I presume that, in case of attack by an enemy, he would go where the danger was. But it is clear that, as lieutenant-governor of Portsmouth, he resides in these premises for the purpose of performing his public duty. The case must follow the event of the cases preceding.

COLERIDGE, WIGHTMAN, and ERLE, Js., concurred.

The QUEEN v. FOSTER.

ON appeal by Thomas Foster against a rate made, 19th October, 1855, for the relief of the poor of the parish of Portsea, within the borough of Portsmouth in Hampshire, the Recorder confirmed the rate, subject to the opinion of this Court on a case.

The rate was as follows.

Name of Occupier.	Name of Owner.	Description of Property rated.	Name or situation of Property.	Estimated gross rental.	Rateable value.	Rate at 1s. 6d. in the pound.
Colonel Foster.	Board of Ordnance.	House, Garden, and Stables.	Landport Road.	House 103 0 Garden and Stables } 13 10 £116 10	House 90 0 — 13 10 £103 10	— 6 0 — 0 18 £6 18

*The case stated as follows.

The appellant is a colonel in Her Majesty's corps of Engineers, [*381] and commanding Royal Engineer in the South-west and Sussex Military Districts of England; which Districts comprise the whole of the counties of Hants, including the Isle of Wight, Wilts, and Dorset, and the city of Chichester; the head quarters of the district where the appellant is stationed being at Portsmouth. The office of Colonel in Her Majesty's corps of Engineers and commanding Royal Engineer are public military offices held under the Crown; and, besides the ordinary duties of the commanding officer of engineers in those districts, he has also charge of all the fortifications there. No part of the appellant's public duties is carried on upon the premises assessed to the above rate, which are solely occupied by him as his residence. These duties are performed at the Ordnance Office in the town of Portsea, nearly a mile from the premises rated: and the appellant acts in every part of the above District under the order of the lieutenant-governor commanding in chief in those districts.

The premises for which the appellant is rated consist of a house, stabling, garden, and meadow land, the meadow land being part of the glacis of the fortifications of Portsea within the garrison of Portsmouth. The whole are the property of the Crown, and have constituted the residence and premises of the appellant's predecessors in office for many

years, and were assigned to him as the residence and premises provided for him by the Crown whilst holding the office of commandant of engineers, and performing the duties thereof: and the appellant came to reside in them under the orders of the War Department at the time of *382] his appointment in the month *of August, 1855. The house comprises in the basement several cellars; on the ground floor, dining-room and drawing-room, store-room, butler's pantry, kitchen, scullery, and pantry; on the first floor, bath-room, two dressing-rooms, and three bed-rooms; on the second floor, three attics. There is also a garden in the rear of the premises, which, together with the ground occupied by the house, is 1 a. 3 r. 2 p. in extent; and in which are grown fruit and vegetables. In this garden there is a small house. The stable contains accommodation for four horses; but the appellant keeps only one, which he is compelled to do by the rules of the service; which it is necessary he should do in order to enable him properly to perform his duties. Forage is also allowed him by the Crown for one horse. Besides other outbuildings, there is a coach-house, loose-box, and harness-room, and cottage for the groom. And also, included in the premises assessed to the above rate and occupied by the appellant, there is meadow land of between three and four acres in extent, and from which the appellant obtains profit by making hay and by letting it for grazing. The appellant's family consists of his wife and one son, who, together with three of his five servants, reside with him. The house is larger than is absolutely necessary for the accommodation of the appellant and his family. The appellant receives a salary from the Crown, his pay as colonel of engineers, and 3s. a day for his additional duties as commanding officer of engineers for the District. The appellant pays no rent in respect of the said premises; but the use of them is a part of the emolument derived by him from his appointment. The premises have always been assessed to the poor-rates, inhabited house duty, assessed *383] and *other taxes; and the same have been paid by the appellant during his occupation of the premises. He is liable to be removed from Portsmouth to any other place or station, at any moment, at the pleasure of the Crown.

The question was stated for the Court as before, *mutatis mutandis*.

Hugh Hill and *W. M. Cooke* relied upon the finding that no part of the appellant's duties were carried on upon the premises rated.

Weisby, *Poulden*, and *C. B. Russell*, *contrà*, denied that this affected the case.

The Court (Lord CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and ERLE, Js.) said that the event of this case must be the same as that of the cases preceding.

The rates to be amended by assessing the appellants in respect of the occupation so far only as it shall be considered to exceed the accommodation necessary for the performance of the several duties.

***The QUEEN v. WILLIAM WAKE. Nov. 7. [*384**

Where one of two, appointed, under stat. 9 & 10 Vict. c. 95, s. 25, "to execute jointly the office of clerk" to a county court, dies, the survivor continues to hold the office; though he cannot act till a successor to the deceased person be appointed.

INFORMATION in the nature of Quo warranto, at the relation of George Weller. The information recited that, by virtue of stat. 9 & 10 Vict. c. 95, "For the more easy recovery of small debts and demands in England," the county of Derby was divided into districts, and the county court was ordered to be holden in each of such districts; and one of which districts was holden at Chesterfield in the said county of Derby, for the recovery of, &c.: and that Joseph Thomas Cantrell, Esquire, barrister at law, was duly appointed judge of the said county court. And that the said J. T. Cantrell duly appointed George Weller, being an attorney, &c., under the authority of the said Act, registrar for the said county court of Derbyshire holden at Chesterfield aforesaid; and that such his appointment was duly approved of by the Lord Chancellor. And that, to wit, from 14th January, 1857, to 5th February, 1857, personally, and by his assistants and clerks, the said George Weller duly exercised the duties of the said office of registrar of the said county court, and hath always been able, and still is able and willing to perform the duties of the same. That William Wake, of, &c., attorney at law, heretofore, to wit, on the 5th February, 1857, at the county court of Derbyshire aforesaid, held, as aforesaid, at Chesterfield aforesaid, did use and exercise, and from thence continually afterwards to the time of exhibiting this information hath there used and exercised, and still doth there *use and exercise, without any legal warrant, royal grant, or right whatsoever, the office of registrar of the said county [*385 court for the county of Derby, holden at Chesterfield aforesaid; and, from and during all the times last above mentioned, hath there claimed, and still there claims, to be registrar of the said county court of Derbyshire, holden at Chesterfield aforesaid, and to have, use, and enjoy all the rights, privileges, and emoluments to the said office of registrar of the said county court belonging and appertaining. Which said office, rights, privileges, and emoluments he, the said William Wake, for and during all the time last above mentioned, upon our said Lady the Queen; without any legal warrant, royal grant, or right whatsoever, hath usurped, and still doth usurp, that is to say at the said county court of Derbyshire holden at Chesterfield as aforesaid, in contempt, &c. Prayer that the defendant may answer and show by what authority he claims to have, use, and enjoy the office, right, privileges, and emoluments aforesaid.

Plea. That, after the said county court was divided into districts, as in the information mentioned, and after the said J. J. C. had been appointed, and whilst he was such judge of the said county court of Derbyshire, holden at Chesterfield as aforesaid, and before any appointment of the said George Weller as registrar of the said county court, and before the passing of stat. 15 & 16 Vict. c. 54, "Further to facilitate and arrange proceedings in the county courts," the said District, in and for which the said county court was holden, being then a populous district, it appeared to the Right Honourable Charles Christopher Lord

Cottenham, the then Lord High Chancellor of Great Britain, expedient to direct, and the said Lord Chancellor did then under and by virtue of *386] the said stat. 9 & 10 Vict. c. 95, direct, that two persons should be appointed to execute jointly the office of clerk for the said county court of Derbyshire, holden at Chesterfield. Whereupon the said J. T. Cantrell, as such judge of the said county court, did, to wit, on the 17th March, 1847, by writing under his hand, under and by virtue of stat. 9 & 10 Vict. c. 95, and by the direction and subject to the approval of the said Lord Chancellor, appoint William Waller and the said William Wake, gentlemen, attorneys, &c., to execute jointly the office of clerk of the said county court of Derbyshire, holden at Chesterfield aforesaid: and which said appointment was afterwards, and before any appointment of the said George Weller as registrar for the said county court, duly approved of by the said Lord Chancellor: and which appointment and approval still remain in full force. By virtue whereof the said William Wake did afterwards, and during the said time in the said information mentioned, use and exercise, and claim, and still doth claim, to use and exercise, the office of registrar of the said county court, and to have, use, and enjoy all the rights, privileges, and emoluments to the said office and appointment belonging and appertaining, as it was lawful for him so to do. Verification, &c.

Replication. That the said appointment of the said William Waller and William Wake, in the plea of William Wake mentioned, was in the words and figures following; that is to say:

"I, Joseph Thomas Cantrell, judge of the county court of Derbyshire to be holden at Chesterfield, do hereby, by virtue of" stat. 9 & 10 Vict. c. 95, "appoint, by the direction and subject to the approval of the Lord Chancellor William Waller and William Wake, gentlemen, *387] attorneys of one of Her Majesty's Superior Courts of common law, to execute jointly the office of clerk of the county court of Derbyshire, to be holden at Chesterfield. As witness my hand, this 17th day of March, 1847.

"JOSH. THOS. CANTRELL."

"Approved. COTTENHAM, C."

That, after the said appointment, and before any appointment of the said George Weller, as registrar for the said county court, and after the passing and coming into operation of stat. 19 & 20 Vict. c. 108, "To amend the Acts relating to the county courts," to wit, on 11th January, 1857, the said William Waller died: and the said William Wake thereupon ceased to be clerk or registrar of the said court. And thereupon, afterwards, the said George Weller was appointed sole registrar of the said court, as in the information alleged. Verification, &c.

Demurrer. Joinder.

Hugh Hill, for the defendant.—The death of Waller did not put an end to the tenure of office by the defendant. The question turns on sect. 25 of The County Court Act, 9 & 10 Vict. c. 95, which enacts "that it shall be lawful for the Lord Chancellor, in populous districts in which it shall appear to him expedient, to direct that two persons shall be appointed to execute jointly the office of clerk, under such regulations as to the division of the duties and emoluments of the said office as shall be from time to time made by order of Court in case of difference between them, each of such persons being qualified as is

hereinbefore provided in the case of a single clerk." It is not to be inferred, from the phrase "to execute jointly," that the *appointment is vacated at any instant at which it becomes impossible [*388 that there should be a joint execution by the two. In sect. 11 of the same Act there is a proviso for the case of the consolidation of the two courts there named: and it is enacted that the two clerks of the courts shall, upon such consolidation, "act jointly as clerks of the consolidated court:" but it cannot be supposed that the Legislature there intended that two persons, who each held an independent office, should, upon the change, be each liable to lose it by the death of the other. In the case of two sheriffs for one place, it is true, every act is done in the name of both; and if one dies, the other cannot act: *Jones v. Pugh*, 2 Salk. 465. That, however, applies only to the acting, not to the holding. But the principle of the County Court Act is, where the districts are "populous" and the duties large, to assign separate duties to each of two officers holding jointly, as appears by the words of sect. 25, "division of the duties and emoluments," which occur also in the provisions as to the joint execution of the office of clerk in sects. 34, 35. Could it be held that, if one of the two was removed from office for misconduct, that would displace the other? [Lord CAMPBELL, C. J.—The one would then hold office during the good behaviour of the other, or during his pleasure.] It is to be observed that the office here is not judicial, but ministerial: *Dews v. Riley*, 11 Com. B. 434 (E. C. L. R. vol. 73). The duties are specified in sect. 27. Auditor Curle's case, 11 Rep. 2 b, may be cited on the other side. There it was held that the office of one of the auditors of the Court of Wards might be granted to two and the survivor; but that, if simply granted to *two for their lives, it [*389 would become altogether vacant by the death of one. But it has been shown that the Legislature in the present case had in view a different tenure. Each is a complete clerk; just as, under 5 & 6 W. 4, c. 50, s. 6, each of several persons elected "to serve the office of surveyor" of a parish is, by himself, a surveyor: *Morrell v. Martin*, 6 New Ca. 373 (E. C. L. R. vol. 37). By stat. 15 & 16 Vict. c. 54, s. 19, there is a survivorship, in case of the death, removal, and resignation of the persons possessing the office of clerk of the Gloucestershire county court holden at Bristol. Where three testamentary guardians were appointed, and two died, it was held that the survivor was sole guardian, though the devise said nothing as to survivorship: *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103. In truth, however, the safe course here is to look at the general intention of the statute itself: little reliance can be placed on analogies.

Lush, contra.—The language of the statute must be construed in conformity with the known construction of legal language. The words "execute jointly" are inapplicable to an execution by one. That which is to be executed is the "office of clerk," not "offices of clerks:" and the language of sects. 34 and 35 is similar. The office is a freehold. As to the "division of the duties," the Court may direct that one shall issue plaints, another warrants. [WIGHTMAN, J.—Or that they shall attend different Courts. CROMPTON, J.—Or in different divisions.] Still the offices cannot be made distinct. There might perhaps be two seals: but it seems that there could be only one place for affixing *them. [*390 [WIGHTMAN, J.—Why not every place where the court is held?

COLERIDGE, J.—There must be in fact a set of books, for registration, in every such place.] It is observable that in sect. 31 the language is different: "one or more high bailiffs." The appointment, as it appears on the record, is similar to that in Auditor Curle's Case, 11 Rep. 2 b, which has always been cited as a leading authority: 6 Bac. Abr. 36 (7th ed., *Offices and Officers*, (K)). Sect. 19 of stat. 15 & 16 Vict. c. 54 has been referred to: that, however, shows that the Legislature thought an express provision necessary to give survivorship. The same remark applies to sect. 17 of stat. 20 & 21 Vict. c. 77, where power is expressly given to appoint, in certain cases, more than one "to hold such office of district registrar jointly with benefit of survivorship." [Lord CAMPBELL, C. J.—That is, benefit of survivorship of the whole office: it does not follow that, without the clause, the survivor could lose his share of the office on the death of the other.] If one sheriff of London die, the other cannot act alone: but, as the office is ministerial, the death of one does not displace the other. [Lord CAMPBELL, C. J.—The sheriff has judicial duties.] The judicial duties are rather in the undersheriff, of whom the law takes notice. If there be an office, wholly or partly judicial, vested in two, the death of one avoids the appointment altogether, unless there be words of survivorship: *Jones v. Pugh*, 2 Salk. 465; in which latter case the survivor cannot act till a new person be appointed instead of the person deceased. Now it is true that in *Dews v. Riley*, 11 Com. B. 434 (E. C. L. R. vol. 73), it was decided *391] that the office of county clerk is only ministerial so far as affects *his duty of signing warrants in conformity with the order of the judge. But he has other duties: that, for instance, of "taxing costs," mentioned in Schedule (D.) of stat. 9 & 10 Vict. c. 95, which is clearly judicial. Sects. 34 and 35 of stat. 19 & 20 Vict. c. 108 direct that costs shall "be taxed by the register of the Court;" the statutes respecting county courts had in view the case where the party should have no attorney. [Lord CAMPBELL, C. J.—He acts as adviser of the Court rather than judicially. ERLE, J.—It is enacted, in some cases of compensation, that the Master shall tax costs: I have held that he does so only as the Master generally does, and that the act is that of the court.] There is an appeal, by way of review, under sects. 34 and 35 of stat. 19 and 20 Vict. c. 108. [ERLE, J.—Is not that a reference to the Court of the question whether it will or will not adopt, for its own act, the taxation by its officer? WIGHTMAN, J.—You admit that, if this office be merely ministerial, the analogy of the office of the sheriffs of London applies.] That seems to be so. It may also be argued that, even if the present defendant holds, still he cannot execute the office till another is appointed, and that therefore formally the Crown is entitled to judgment: but the relator does not press that, as the parties do not desire to raise any merely technical question.

Hugh Hill was not called on to reply.

Lord CAMPBELL, C. J.—I am of opinion that this information cannot be supported, and that judgment must be given for the defendant. It is allowed that, if this office be merely ministerial, the authorities, which *392] sanction the notion of its being wholly avoided by the *death of one of the appointees, are inapplicable. The inclination of my mind is, that the office is purely ministerial. The clerk taxes the costs, not as a judge, but as an assessor, subject to the adoption by the court.

But, even if the office be judicial, the information cannot be supported. We must look at all the intention of the Legislature, in order to see whether it was intended that the clerk should hold during good behaviour. I am of opinion that this was intended: not, indeed, that the survivor of two appointees should have the whole office; but that, after the death of one, the other should continue to hold, not acting till a successor to the deceased party should be appointed. There can be no doubt that, in cases where one person only is appointed to execute the office of clerk for the district, he holds during good behaviour. We cannot suppose that the Legislature intended to commit such injustice as to intend that each of two appointees should hold only till the death or resignation of the other, and be ousted on such an event occurring, or upon the other being convicted of fraud. The two are to act: when one dies, the survivor is not ousted, and does not cease to be clerk: but he cannot act till the successor to the deceased person is appointed. Mr. *Lush* has temperately abstained from raising the technical question as to the position of the surviving clerk, supposing him still to hold the office, until the successor is appointed. I think the appointment of the relator as sole clerk is void, and that the defendant is in the same situation as if that appointment had not been made. After the appointment of a successor to the deceased person, to act jointly with the defendant, the defendant will be in the same situation as before the death of the late clerk. *The analogy of the case with that of the sheriffs of London is very strong. Every sheriff is a judicial officer, [*393 and has many judicial functions to perform. But, if one dies, the other is not ousted, though he cannot act till a new sheriff is appointed.

COLERIDGE, J.—I am entirely of the same opinion. I do not think it necessary to inquire whether the office is ministerial or judicial, or whether it is partly the one and partly the other: still less do I think it necessary to examine the general law upon which Mr. *Lush* relies. But we are to collect the general intent of this Act of Parliament; and that I think appears to be essentially different from the general rule laid down in Auditor Curle's Case, 11 Rep. 2 b. The two clerks here execute the office jointly: but they are to act under such division of their duties as the Court may order. It is therefore assumed that they will act severally, not that they are to concur in any one act. But the 25th section goes on: "and where under the provisions of any Act cited in either of the said schedules (A.) and (B.) more than one clerk is now acting in and for the court holden under such Act, the same number of clerks shall be continued, unless it shall seem expedient to the Lord Chancellor to order that such number be reduced." Here it is enacted that the same number of "clerks" shall be appointed. Now look at the difference between this and Auditor Curle's Case: That was created by stat. 32 H. 8, c. 46, s. 5, which enacted "that there shall be two persons," named by the Crown, "which shall be called the auditors of the lands of His Grace's Wards, *and shall be called the fourth [*394 officer of the same Court." The Court there, in their second resolution, say: "In this case no survivor can be: for inasmuch as it is entitled by the Act of Parliament, by which this new court was erected, that there shall be two persons, &c., who have (as is aforesaid) a judicial voice, the King cannot constitute one only, for the subject by the Act has interest in it, et securius expediuntur negotia commissa pluribus;

but the King may constitute one at one time by one patent, and another at another time by another patent; and although he may so do, yet he who is first constituted has not any judicial voice till the other is constituted; for it is enacted by the statute, that two persons, &c., shall be one officer." Another distinction is suggested by Mr. Fraser's note: (a) Auditor Curle's Case, 11 Rep. 2 b, must be understood *secundum subjectum materiam*; an auditor's place cannot be exercised by deputy. But, by sect. 26 of stat. 9 & 10 Vict. c. 95, the clerk, or in the case of his inability the judge, may appoint a deputy. There can be no doubt that the Legislature meant that the duties of the clerks should remain separate, according to the division which should be made of them. If the law were otherwise, one clerk, as my Lord pointed out during the argument, would hold during the good behaviour of the other, indeed during his pleasure.

WIGHTMAN, J.—If the clerk's duties be merely ministerial, the death of one of the two will, as is admitted, merely suspend the execution of the duties by the other. But, even taking them to be partly judicial, *395] the *Legislature seems to have treated them as ministerial. Each clerk is to execute such of the duties as shall be ordered by the division to be made by the court; the office is therefore to be divided into several offices. And this is quite consistent with the enumeration of the duties in sect. 27, to which allusion has been made. Even as to costs, which is the only subject in which Mr. Lush contends that the registrar has a judicial office, the clerk acts only as an assessor, enabling the court to judge what order is proper in that respect; and it is the court that adjudicates: though it is true that, in the sections which have been referred to, the expression might at first sight appear to import that the registrar acts directly. But, after all, the question for us is, what did the Legislature intend when stat. 9 & 10 Vict. c. 95, was passed? The analogy of this case to that of the sheriffs of London seems to me very strong.

ERLE, J.—The question before us is, whether, when two persons are appointed to execute jointly the office of clerk of a district, the death of one vacates the office of the other. In Auditor Curle's Case, 11 Rep. 2 b, it is laid down that, where two are appointed jointly to a judicial office, the death of one does vacate the office of the other. But I am of opinion that there is no analogy between the judicial office there spoken of and the duties to be executed by the clerks in the present case. When two are appointed to be jointly a judge, there the judgment which they are to give is the judgment of both: so that, if one die, the appointment is wholly at an end. If two arbitrators be appointed, with *396] power to appoint an *umpire, there it is clear beyond doubt that the death of one arbitrator puts an end to the authority of both. But such cases have no analogy with the present case. Here each clerk, as my brother Coleridge has pointed out, is to act separately: the statute enables the court to assign separate duties and separate emoluments: and the case contemplated is that of a populous district where more than one officer will be required to perform separate duties.

Judgment for defendant.

CHAPMAN *v.* EMMA MARY VAN TOLL. Nov. 9.EMMA MARY VAN TOLL *v.* CHAPMAN.

After the issuing of a writ in an action on a common money bond, the defendant wrote, stating that he had paid a part and could prove this, and that he was ready to pay the rest. The attorney for the claimant did not apply for an order of reference under sect. 3 of the Common Law Procedure Act, 1854, but delivered a declaration, to which the defendant pleaded payment. When the cause, after a considerable lapse of time, was in the paper for trial, a judge's order was obtained by consent to refer the matter to the Master to take the account; and he made his allocatur in favour of the plaintiff for debt and costs. After the letter was written, and before the allocatur was made, the defendant became bankrupt. In an action brought by the attorney for the plaintiff, against the plaintiff, on his bill, and in a cross action for negligence, the attorney admitted in evidence that the section did not occur to his mind on reading the letter, and that he could not say that the section ever came to his memory. Held, dissentiente Lord Campbell, C. J., that there was no evidence of negligence on the part of the attorney in not applying for an order under the section; for that it could not fairly be said that it would have clearly appeared to any reasonable person that the matter in dispute consisted either wholly or in part of matters of mere account which could not conveniently be tried by a jury.

THESE were cross actions. Both were tried before Lord Campbell, C. J., at the Sittings at Westminster after Easter Term, 1857.

Chapman *v.* Van Toll was an action, on an attorney's bill of costs, to recover 48*l.* 3*s.* 10*d.* Defendant pleaded Never indebted. Issue thereon. The evidence was, that the plaintiff was instructed on the 4th of July, 1855, by the *defendant, Mrs. Van Toll, to proceed [*397 against a Captain Roberts upon a common money bond given by him to her to secure the repayment of 1000*l.* The plaintiff accordingly wrote to Roberts a letter in the common form of application; and, receiving no reply, issued and served a writ on the 11th of July. On the 16th Roberts wrote to Mrs. Van Toll the following letter. "Madam, Your proceedings have rather astonished me, knowing, as you do, that you have received at various times, over and above your interest, the sum of 480*l.* Therefore all that is legally coming to you is the difference of 1000*l.*, viz., 570*l.* This sum I shall be ready to hand over to you through my solicitors upon your giving a proper receipt in the full amount. I am prepared to show that such has been received by you." This letter was handed on behalf of Mrs. Van Toll to the plaintiff, who treated it as unsatisfactory, and proceeded with the suit. On the 24th of July Roberts appeared to the writ; and on the 26th of July the declaration was delivered. If the cause had proceeded with the utmost despatch it might have been ready for trial at the Surrey Summer Assizes; but, by consent and on summonses, time was allowed to the defendant to plead until the 8th of November, when the venue was changed to London, and the defendant delivered a plea setting out the bond and condition, and alleging a general performance. On the 14th of November the plaintiff replied, assigning as a breach that the defendant had not paid the sum of 1000*l.* or any part thereof. On the 19th the defendant delivered rejoinders, alleging payment *ad diem* and payment *post diem*. The cause was at issue on the 20th of November, 1855. Briefs were prepared and delivered to counsel; and the cause was in the paper for trial at Guildhall on the 14th of December. Before the cause was called on for trial, it was agreed *between the [*398 respective counsel for the parties that application should be

made to a Judge for an order to have the account between the parties taken by the Master, and that, upon such order being made, judgment should be signed for the full amount claimed, but subject to be reduced according to the Master's certificate. Such order was made; the record was withdrawn; and judgment was signed. Afterwards the parties went before the Master, who, on the 10th of January, 1856, made his allocatur, declaring the amount due to the plaintiff to be 741*l.* 2*s.* 6*d.* on the bond and 37*l.* 2*s.* 6*d.* for costs. The attorney of Roberts, upon notice of the Master's decision and afterwards, asked for time to be given to his client to pay the amount, stating that his client, if pressed, would be driven into bankruptcy. Time was given, by the advice of the plaintiff and with the consent of Mrs. Van Toll, until the 26th of February, 1856, when a ca. sa. was issued and delivered to an officer. But Roberts left the kingdom before it could be executed. Mrs. Van Toll then changed her attorney. Roberts afterwards, in June, returned to this country; and a new writ of ca. sa. was issued, upon which he was arrested. He, however, immediately applied to the Court of Bankruptcy for protection, and obtained a certificate. In the course of the trial of the present case the plaintiff and his London agent, who were called as witnesses, were asked by the Lord Chief Justice whether, on reading the letter from Roberts of the 16th of July, 1855, it did not occur to their minds that it would be a good thing to apply to a Judge under the 3d section of The Common Law Procedure Act, 1854 (17 & 18 Vict. *399] c. 125), for an order that the matter should be referred. (a) They *both answered that it did not occur to their minds; that they could not say that the section ever came to their memory. Upon this evidence it was contended, on behalf of the defendant, that the plaintiff could not recover for any part of his demand, because he had been guilty of negligence which had caused his services to be of no value to the defendant; the negligence relied on being, first, unreasonable delay in the action; and, secondly, that the plaintiff did not apply for an order of reference under the third section above alluded to. The Lord Chief Justice thought that there was no sufficient evidence of negligence in the first particular relied on; but, as to the second, he, in the course of summing up, told the jury that the section was a most salutary enactment; that the matter in dispute in this case was undoubtedly a mere matter of account; that it was in his judgment within the section; and that he had no hesitation in saying that it was a case in which a Judge would have made an order of reference, unless perhaps the defendant had shown strong cause to the contrary. And he left it to the jury to say whether the plaintiff had not been guilty of negligence in not applying for the order, and whether his services had not been thereby rendered wholly useless to the defendant. The jury thereupon asked when the Act of Parliament was passed, and, upon being told that it passed in 1854, found their verdict for the defendant.

Van Toll v. Chapman was a cross action for negligence in the conduct of the suit on the bond. On the same evidence as to negligence, and upon further evidence of the circumstances of Captain Roberts in the period between July 1855 and June 1856, it was contended on behalf of *400] the plaintiff that there was evidence of negligence in the *delay of the cause, and in the omission to apply for an order of reference;

(a) See stat. 21 & 22 Vict. c. 74, s. 5.

and that the plaintiff had, in consequence of that negligence, been prevented from recovering her claim. The Lord Chief Justice ruled, as before, that there was not sufficient evidence of the negligence first charged, but that there was evidence of the negligence charged secondly. And he summed up in the same terms as in the former trial. The jury found a verdict for the plaintiff, and gave damages 644*l*.

In Trinity Term, 1857, a rule was obtained by Sir *F. Thesiger* in the first action, calling upon the defendant to show cause why there should not be a new trial, on the ground that the Lord Chief Justice misdirected the jury, by directing them that there was evidence of negligence which disentitled the plaintiff to recover, whereas he ought to have told them that there was no such evidence, and that the omission to take out a summons under The Common Law Procedure Act, 1854, for an order to refer, was not such negligence; and that he ought to have told the jury that the plaintiff was at any rate entitled to recover for the costs of the writ, the proceedings before the Master and the judgment. And Sir *F. Thesiger* obtained a similar rule in the second action, on the ground of misdirection in telling the jury that there was evidence of negligence upon which they might find a verdict for the plaintiff; whereas he should have told them that there was no such evidence, and that the omission to take out the summons referred to was not such evidence as would justify them in finding the defendant guilty of negligence.

Shee, Serjt. (with whom was *Doyle*), now showed cause against these rules.—If there was any evidence of *negligence, the learned Judge properly left it to the jury to say whether there was or [*401 was not such negligence as rendered Mr. Chapman liable to his client, and deprived him of any right to remuneration. It was not the duty of the learned Judge, as the rule assumes it was, to determine himself the question of negligence or no negligence. Thus in *Hunter v. Caldwell*, 10 Q. B. 69 (*E. C. L. R.* vol. 59), where the question was whether an attorney had been guilty of negligence in not duly filing a writ for the purpose of saving the Statute of Limitations, a question of a peculiarly technical character, the Judge at the trial received evidence of the general course of practice, told the jury his opinion as to the meaning of the term "filing" in the statute, and then directed them to consider whether at the time of the alleged negligence the practice in question was settled and well known to legal practitioners in general; observing that every attorney was bound to exercise a reasonable skill on behalf of his client; and that it was for the jury to say, with reference to the practice and understanding of the profession, whether such reasonable skill had been exercised by the defendant. Upon objection taken that the Judge ought to have determined the question himself, the Court upheld the direction, which was substantially the same as that now in dispute. The question therefore is, whether there was in this case any evidence of negligence. To determine that, it must be seen what, if any, was the duty of the attorney in these cases, and whether there was any evidence of a breach by neglect of that duty. Now, from the cases commencing with *Pitt v. Yalden*, 4 Burr. 2060, the general rule is to be collected, that, [*402 *although an attorney is not bound to guaranty success, he must not be guilty of culpable negligence. In *Godefroy v. Dalton*, 6 Bing. 460 (*E. C. L. R.* vol. 19), the rule is thus more specifically enunciated: "He is liable for the consequences of ignorance or non-observance of the

rules of practice of this Court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses: and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law." In *Hart v. Frame*, 6 Cl. & F. 193,^(a) the duty of an attorney seems to be set very high. It is there said by Lord Cottenham, C.: "It was the duty of the appellants to look with their own eyes, and judge with their own understandings; and if, instead of doing so, they have blindly followed the erroneous course taken by another agent, they cannot complain of being made responsible for the consequences of the error into which this false guide led them." It may therefore be stated that it was the duty of the attorney in these cases to know of the existence of the enactment contained in the third section of The Common Law Procedure Act, 1854, and to determine whether the case was within it. The enactment contains a rule of practice which it was specially the duty of an attorney to attend to. But Mr. Chapman forgot the existence of the enactment, and did not in any way consider whether the case was within *403] it or not. [ERLE, J.—Is not there a preliminary question, *namely, whether the case was so clearly within the enactment that any attorney of reasonable skill, on considering the case, was bound to know that it was within the Act? If the matter is doubtful and intricate when considered, is it material whether he did or did not consider a problem which he was not bound to determine? Lord CAMPBELL, C. J.—If the case is not clearly within the statute, the direction cannot be supported.] It is submitted that the case is clearly within the enactment. The enactment is: "if it be made to appear, at any time after the issuing of the writ, to the satisfaction of the Court or a Judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or Judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator," &c. Now the matter here was one of mere account. All that the arbitrator had to do was to examine vouchers and take the account. [WIGHTMAN, J.—The question raised was payment or no payment. Does such a question always necessarily resolve itself into a matter of mere account, or may it not lead to a controversy very proper to be determined by a jury? And, if it does not necessarily resolve itself into a matter of mere account, how could the attorney in this case be bound to act upon the supposition that it would be so resolved? ERLE, J.—It has been found very difficult at Chambers to define the meaning of the term "mere account." WIGHTMAN, J.—Moreover, how do you show that this case was one which *404] could not conveniently be tried by a jury?] That may *depend on the meaning to be attributed to the word "conveniently" in the section. Does not that part of the enactment point to cases in which an arbitration would clearly be the less expensive and more proper remedy? [Lord CAMPBELL, C. J.—The enactment is highly beneficial, and should be liberally construed. ERLE, J.—But, if it is difficult to construe, was the attorney in this case bound to construe it correctly?]

Not if it was difficult: but the client here contends that it was plain. It is not necessary that all the items of the account should be undisputed: *Browne v. Emerson*, 17 Com. B. 861 (E. C. L. R. vol. 84).

Sir *F. Theiger* and *H. Hawkins*, *contra*, were not heard.

Lord CAMPBELL, C. J.—The rule must be absolute for a new trial, as my learned Brothers are of opinion that this was not a case within the third section of The Common Law Procedure Act, 1854. I continue of opinion that it was; and that there was evidence to be left to the jury of negligence. It had long been matter of regret, that, although trial by jury in cases fit for that tribunal was the best mode of trial ever invented, yet there were cases triable, according to law, by jury which were wholly unfit for that tribunal. In actions involving long columns of items of account by way of demand and cross demand, the administration of justice had frequently been brought into disrepute, because, after the expense of preparing the cause and engaging counsel had been incurred, it was found, when the case was before the jury, that the tribunal was wholly inadequate to the performance of the functions cast upon it, and *that it was absolutely necessary that the parties should [*405 be compelled to refer the whole matter to arbitration. This state of things led to the very salutary enactment which has been quoted. I am of opinion that the cases now under consideration are such as must be taken to have been in the contemplation of the Legislature when that enactment was passed. The action is on a common money bond; and the obligor does not deny his liability to pay something, but by letter says he has paid part, and can prove the payments. The order to the Master therefore would have been in effect an order to sit down at a table, hear the parties, examine the vouchers, and take the account. That is precisely the sort of case, in my opinion, which was contemplated by the Legislature. If I had been sitting at Chambers and an application under the section had been made, I should have thought the case one of mere account, and *prima facie* one which a jury ought not to try. I should have made the order without hesitation, unless some grounds were laid before me to show that it was convenient that the case should be tried by a jury. If it were shown that there would be conflicting evidence as to payment, I should say that the case ought to be tried by a jury. But I have no reason to suppose that the writer of the letter of the 16th of July in this case could have shown any such valid objection to the order; and therefore I cannot entertain a doubt that, if application had been made, a Judge would have made the order. I therefore think that the attorney was bound to make application for an order. If he had, Mrs. Van Toll would have obtained the Master's allocatur in July when Roberts was still solvent, and would in all probability have recovered her demand. But, instead of that, after declaration, plea, issue, *briefs, fees, and a delay until December, she [*406 obtained by consent that allocatur in January which she might have obtained without expense in July; and, when it was obtained, Roberts was insolvent, so that she lost more than 700*l.* which she might otherwise have recovered, and is called upon to pay more than 40*l.* for proceedings that have entirely failed. I think that there was, under such circumstances, evidence of negligence to go to the jury. In the last case of this kind, *Long v. Orsi*, 18 Com. B. 610 (E. C. L. R. vol. 66), it was held that it was negligence in an attorney to bring an action

on a French bill of exchange without seeing that there was a proper endorsement on it to the plaintiffs according to the law of France. That decision threw on the attorney a more onerous duty than would be imposed in this case if decided as I think it should be.

COLERIDGE, J.—I have listened with great respect and attention to the judgment delivered by my Lord; but I am still of the same opinion as early in the argument, that the rules for new trials in both cases ought to be made absolute. The question, as it seems to me, is not what is the right construction of the enactment with regard to the facts of this case, but it is whether, on the facts presented to the attorney at the time, the case was so clearly within the section as to make it negligence in him not to have applied for an order under it. Now it seems clear that the section does not apply to all matters of account. If the words of the statute had been "of matters of account," it would have been applicable to all matters of account, and might have left every case *407] to the discretion of the Judge. But *the power of the Judge to make a compulsory order is confined, first, to matters of "mere account," and, secondly, to such matters only, though of mere account, "which cannot conveniently be tried in the ordinary way." Then was this case clearly one which could not conveniently be tried by a jury? If, to any reasonable person who might consider it, it was clearly a case of mere account, and one which might conveniently be tried by a jury, the attorney was negligent or unskilful in not so treating it, and in not applying for an order under the section. But I do not think that the case was within the section: and it seems too hard to say that an attorney would be bound to construe the section as applicable when the Judges of this Court differ in opinion as to whether it is or not. And, if the attorney would not have been bound to construe the section as applicable, it signifies not whether he took the section into consideration or not.

WIGHTMAN, J.—The question is, whether the case presented to the attorney was so clearly within the section that it was negligence in him not to so treat it and apply for an order of reference. I quite agree with my Lord as to the beneficial tendency of the enactment, and as to the inconvenience of the state of things it was intended to remedy. But the question is, what is the construction of the section as drawn? It contains a limitation which leaves a question open in every case, whether that particular case could conveniently be tried in the ordinary way. Some cases clearly cannot: every reasonable person must know that they cannot. But were the facts in this case such as to show to *408] any *reasonable person that this could not? The facts were: that an action was brought upon a common money-bond; that the defendant pleaded payment; and that he stated by letter that he had paid, and could prove the payments. It seems to me now at least questionable whether a Judge at Chambers would not have considered such a case one which might very conveniently be tried by a jury. Might not the attorney then have also properly considered the case to be one which might conveniently be tried by a jury, and one therefore not within the section? If he might, it seems to me that there was no evidence of negligence in this case to go to the jury.

ERLE, J.—I also think that the rules should be made absolute. I try the question by this test, whether, if this case had been laid before a

Judge at Chambers, and one of the parties had objected to the making of the order, the Judge could have properly held that it was a case within the section, and that he had a right to make a compulsory order. Could he have properly said that, because the dispute was resolved into a question of payment or no payment, it was necessarily a matter in dispute consisting of matters of mere account, or that it was a matter which could not conveniently be tried by a jury? Some cases are clearly within both clauses of this enactment: and about them no difficulty is ever experienced. But it has been found very difficult at Chambers to define either branch of the enactment, so as to apply it to cases which are upon the confines of the definition. If this case had been brought before me at Chambers, I think I should have felt myself bound to say that it was not within the section. Then, if there *be cases not [*409 within the section, and doubtful cases, I cannot think it would be right to hold that an attorney ought in all cases to take out a summons and refer the matter to the discretion of a Judge. Yet, if these rules be discharged, it seems to me that no attorney could safely do otherwise in any case. But to encourage such a proceeding would, to my mind, be to cast a heavy burden on suitors, and to endanger the right which every man has, in almost all cases, to have his dispute tried by a jury of his country rather than by an arbitrator.

Lord CAMPBELL, C. J.—I wish it to be distinctly understood that I did not say that a Judge would have been entitled to make an order in this case in spite of every resistance by Roberts, on whatever grounds made. What I said was that, unless sufficient reasons for the resistance were given, a Judge would make an order in such a case, notwithstanding the resistance. If no sufficient reasons to the contrary were given, I should think that the Judge ought to make the order in such a case.

Rule absolute in both cases.(a)

(a) Reported by W. B. Brett, Esq.

***HEINEKEY v. EARLE and Others. Nov. 9. [*410**

Goods were consigned from London to A. at Sunderland according to order; and a draft for the price, the invoice, and the bill of lading were forwarded. On the arrival of the goods at Sunderland A. was in difficulties, and desired that they should not be received from the wharf where they then lay. But in the absence of A., and without his consent, the goods were deposited on his premises. He afterwards knew of these facts, and took and kept the key of the warehouse in which the goods were deposited. On 4th February A. wrote to the plaintiff, the vendor, returning the draft unaccepted, and stating the circumstances as to the goods, and that a stoppage of his business was decided upon, and continued: "I immediately sent for my solicitor to get his advice, amongst other things, as to whether I could not, under the circumstances, return the hemp to the wharf. He declared not; which placed me under the necessity of depriving you of what I considered your right. I cannot say what dividend yet there is likely to be." "I return your draft, and, although it can be little satisfaction to you, must express my extreme regret that you are so unfortunately placed." On 6th February the vendor applied to A. for the goods, and was referred by him to his solicitor. On 25th February A. made an assignment to the defendants for the benefit of his creditors, and delivered the key of the warehouse to them. The goods were demanded of the defendants and were refused; and the defendants sold them.

Held, in an action of trover by the vendor, that the property in the hemp passed to A. by the delivery on board ship and the forwarding of the bill of lading: that there was no valid rescission of the contract: for that such can only be by mutual consent: that therefore any

expression of a wish to rescind uttered by one party and not communicated to the other is immaterial: that the letter of 4th February, which was communicated to the vendor, did not amount to an offer by A. to rescind, but to an assertion that he could not do so: that there was no valid stoppage in transitu; for the natural transit was ended, and the facts showed that A. had taken to the goods as owner whilst they were in his possession.

By the Exchequer Chamber, affirming the judgment of the Queen's Bench.

TROVER for bales of hemp. The defendants pleaded, first, Not guilty; and, secondly, That the goods were not the goods of the plaintiff. Issue on these pleas.

On the trial, before Wightman, J., at the London Sittings after last Easter Term, it appeared that the plaintiff was a hemp and flax merchant, carrying on business in London under the firm of Robert Heinekey & Co.; and that the defendants were the trustees under a deed of assignment in favour of the creditors of a Mr. Allen Horn, who had carried on business as a rope manufacturer in Sunderland. On 14th of January, 1857, one Swan, as the business manager for Horn, wrote to the plaintiff for his prices for different sorts of hemp. On the 16th of January, the plaintiff answered by enclosing a sample of French hemp, stating a price for it and for freight to Sunderland. On the 21st of January, *411] Swan wrote to the plaintiff: "Agreeable to yours of the 16th instant, I will thank you to forward five or six tons of the French hemp (as per sample), per first vessel, in bales; and, if approved, I shall most probably take a further quantity." On the 22d of January, 1857, the plaintiff wrote to Swan: "We have agreed with the captain of The Aio to take your goods as under; he sails on Wednesday next. Shall we draw on you at four months from Monday next?" And in a postscript to the letter: "To forward to your order about 55 to 59 bales French hemp at 33s. 6d." On the 24th of January, Swan answered as follows: "In reply to yours of the 22d inst., I beg to state that you may value on me at four months for amount of hemp shipped from date of bill of lading, which please to send me in due course. For Allen Horne, J. Swan." The goods referred to in the last two letters were shipped on board a vessel called The Emily on the 27th of January, 1857; and on the same day the plaintiff wrote to Horn, enclosing a draft for the price at four months, an invoice and a bill of lading. The letter was as follows: "We have now the pleasure to hand you invoice, bill of lading, and draft for acceptance, which please return at your early convenience. The Emily will sail to-morrow morning. We trust the goods will arrive safe and please you," &c. The invoice was in the following form.

London, 27th Jany., 1857.

Mr. Allen Horn, Sunderland.

Bot. of Robert Heinekey & Co.

Terms: 4 months bill from date,

	cwt.	£	s.	d.
55 bales French hemp	106 : 8 : 26 @ 33/6,	179	8	11
¶ Emily, your risk, bill lading	Cartage, &c.,	1	13	6
sent same time, "R. H." E. C.		180	17	5

*412] *The bill of lading, which was dated 27th January, 1857, stated that the goods, as per margin (corresponding with the invoice), were shipped in good order, &c., by Robert Heinekey & Co.,

to be delivered in like good order, &c., unto Mr. Allen Horn, rope manufacturer, Sunderland, or his or their assigns, on their paying freight, &c., as per margin, &c. The ship, with the goods on board, arrived in the port of Sunderland on the evening of the 2d of February, 1857. On that day Mr. Horn had found himself in difficulties, and had determined to consult Mr. Crozier, a large creditor, as to whether he ought to go on or stop payment. The meeting with Crozier had been fixed for the morning of the 2d, but did not take place until the afternoon of the 3d. On the morning of the 3d, Mr. Horn first heard of the arrival of the goods, the fact being mentioned to him by Swan at between eight and nine o'clock. He at once told Swan to go to the wharf and give orders not to deliver the goods till after receiving orders from him, Horn. In the course of the morning, Mr. Horn went to his ropery and found there a cartload of the hemp; he told the carter that he, Horn, had given orders it should not be sent, and that he, the carter, was to stop all the rest when he got back to the wharf. This load, however, was uncartered and left on Horn's premises. Mr. Horn then left the premises on other business; and, on his return about three o'clock in the afternoon of the same day, he saw all the rest of the hemp lying there. He thereupon expressed displeasure. The hemp was put in the spinning loft by his servants. The weather was snowy. He gave no directions. When the hemp was taken up stairs it was not put into a machine for use, but was laid on the floor. Mr. Horn stopped business that night after *his interview with Crozier. On the [413 4th of February, Horn returned the plaintiff's draft unaccepted in a letter which was received in due course in London on the 5th, and which was the first intimation the plaintiff had of the embarrassed state of Horn's affairs, or of the other matters therein contained. The letter was as follows: "Sunderland, 4th Feby., 1857. Dear Sir, I do not know what you will think upon receiving this; for, even to my own eyes, the hemp transaction looks so much like a do that I am sure you cannot imagine anything else. But such is not the case, as you will perceive from the facts. Last Saturday, from a statement made to me by my manager, I entertained fears that I could not carry on the business any longer; but, previous to coming to a stop, determined to consult my largest creditor, resident here; and a meeting was fixed for Monday morning; but, owing to his not being able to attend, it was postponed until Tuesday afternoon. Unfortunately, your hemp arrived on the Tuesday morning; and upon hearing of it I directed it was not to be delivered until receiving orders from me; and, as it was a very snowy morning, I thought there was not much chance of its being attempted. However, a short time after, while at the ropery, a cart of the hemp arrived. I immediately told the carter it ought not to have been sent, and directed him to tell them at the wharf not to forward any more until the next morning, my object being to have it warehoused at the wharf in your name should we come to a determination to stop payment. Having to go into the town on business, I found, to my surprise, on my return the hemp lying in the yard; and, very shortly after, the creditor I had to meet came in and saw it. It was determined I could not go on with any prospect *of success; and therefore a [414 stoppage was decided upon. I immediately sent for my solicitor to get his advice, amongst other things, as to whether I could not, under

the circumstances, return the hemp to the wharf. He declared not; which placed me under the necessity of depriving you of what I considered your right. I cannot say what dividend yet there is likely to be; for, having left the business in my folly entirely under the control of my manager, I have been placed in very embarrassed circumstances. I return your draft, and, although it can be little satisfaction to you, must express my extreme regret that you are so unfortunately placed. I am," &c. From the time of his stoppage, Horn kept the key of the place where the hemp was. He kept it till he gave it up to the trustees under the deed with the rest of the property. On the 6th of February, the goods were demanded of Horn by a person on behalf of the plaintiff. Horn referred the person to his, Horn's, solicitor. On the 25th of February, Horn executed an assignment of all his estate for the benefit of his creditors. The defendants are the trustees therein named; and they afterwards took possession of and sold the goods. After the assignment of the 25th of February, and while the defendants were in possession of the goods, and before action, a demand was made on the defendants, on behalf of the plaintiff, for the delivery of the goods, which was refused. On behalf of the plaintiff, it was contended that the delivery to Horn was incomplete, the hemp having been delivered contrary to his orders: that the contract was rescinded: and that the goods were stopped in transitu, the transitus not being determined by a delivery at Horn's premises against his orders. It was left to the *415] learned Judge to direct how the verdict should be taken: and, under his Lordship's direction, the jury found for the plaintiff for the admitted value of the goods; leave being reserved to the defendants to move to set aside the verdict, and to enter a verdict for the defendants, or a nonsuit. The Court to draw any inferences of fact. A rule Nisi was accordingly obtained, on the 23d of May, 1857, on the following grounds: That, by the contract between the plaintiff and Horn, the property in the goods vested in Horn subject to the plaintiff's right to stop in transitu; and that, the goods having reached their ultimate destination, the right to stop in transitu was determined: that the contract of sale never was rescinded so as to vest the property in the goods in the plaintiff: that the intention of Horn, when he received the goods, was immaterial; but, if material, his letter of the 4th of February to the plaintiff, and his subsequent refusal to deliver up the goods to the plaintiff, were conclusive that he took the goods as owner.

Grove and John Henderson now showed cause.—The property in the hemp never passed to Horn, and therefore never to the defendants. It is true that it is generally said that, when goods are shipped according to order, and a bill of lading is forwarded to the vendee, the property and possession in the goods are thereby vested in him subject only to the unpaid vendor's right to stop them in transitu upon the insolvency of the purchaser; but there is another contingency, which is that the vesting of the property is subject also to the vendee's refusal to accept the goods on arrival. If he does so refuse, as Horn refused in this case, *416] the property in the goods is to be taken never to have passed from the vendor. It is stated by Lord Abinger, in *James v. Griffin* 2 M. & W. 623, 640,†(a) that Lord Mansfield upheld the case of

(a) See *Dodson v. Wentworth*, 4 M. & G. 1080.

Atkin v. Barwick, 1 Str. 165, on the ground that the vendee refused to accept the goods on arrival. But, if the property in the hemp did pass under the contract of sale by reason of the shipment and the forwarding of the bill of lading, it reverted in the vendor, as from the 4th of February, by reason of the rescission by mutual consent of the contract of sale. On the 4th of February, Horn, by his letter of that date, gave notice to the vendor of his wish to rescind the contract: and, as there was no evidence of any objection by the vendor, it is to be taken that he agreed to the proposition, and therefore that the contract was rescinded as from the 4th. In *Atkin v. Barwick*, 1 Str. 165, which was an action of trover for silk, the plaintiff was the assignee of bankrupts, by whose order the defendants, on the 7th of April, 1715, had forwarded silk to Penryn in Cornwall. On the 18th of May the bankrupts, who were then in difficulties, sent the silk without the knowledge of the defendants to one Penhallow for the use of the defendants. The bankruptcy was on the 1st of June. On the 6th the bankrupts wrote to the defendants that their affairs were in a declining condition, and that, thinking it not reasonable that the last parcel of goods should go to satisfy their other creditors, therefore they had not entered them in their books, but had left them with Penhallow, who had orders to deliver them to the defendants. On the 9th of June a commission of bankruptcy issued, and the *bankrupt's goods were assigned to the plaintiff. On the 13th [417] of June the defendants received the bankrupt's letter, which was the first notice they had of the delivery to Penhallow; and as soon as possible they signified their consent to take the goods again. Upon these facts it was held that the contract was rescinded as from the 6th of June; and the defendants had judgment. In *Richardson v. Goss*, 3 B. & P. 119, the action was trover for bacon and hams. The goods were shipped by the plaintiff on board a vessel called *The Formosa*, directed to one Wilson, by whom they had been ordered. On the 1st of June Wilson wrote to the plaintiff that he was insolvent, and should not apply for the goods by the *Formosa*. This letter reached the plaintiff on the 3d of June at Newcastle; and he, as soon as the arrangement of his concerns would permit, set out for London, and arrived there on the evening of the 7th. Ten days previously to the letter of the 1st of June, Wilson had directed the defendant, at whose wharf goods were usually landed for him and kept till sent for, to receive the goods coming by *The Formosa*, and had accompanied his directions by an order to the captain of *The Formosa*, in the usual form, to deliver them to the defendant or bearer. Wilson was indebted to the defendant. The plaintiff on his arrival in London demanded the goods in question, and tendered to the defendant the freight and charges; but the defendant refused to deliver them up. Upon these facts the questions were, whether there was a stoppage in transitu, and whether, if not, the contract was rescinded. The Court doubted, as to the stoppage in transitu, whether the transitus had not ceased, but gave judgment for *the [418] plaintiff on the ground that the contract was rescinded. The Court therefore considered that the contract might be rescinded, and was rescinded, as from the 1st of June, though the goods were accepted by the vendee. Again in *Salte v. Field*, 5 T. R. 211, which was an action of trover for calico, the plaintiffs had sold the calico to one Dewhurst, of New York, through his manager in London, and delivered them

on the 8d and 5th of May, 1792, to the manager in London. The goods were sent to the defendant to be packed. On the 9th of April Dewhurst wrote to his manager a letter, which was received on the 18th of May, and shown to the plaintiffs at nine o'clock on that evening, saying that he was ruined, and adding: "if you have purchased any goods for my account, or if any orders are given out, let the persons have their goods back, and countermand all orders." The plaintiffs on sight of the letter told the manager they were ready to take back the goods. On the 18th the goods were attached in the hands of the defendant. On the 23d the plaintiffs demanded the goods of the defendant, who refused to give them up. Judgment was given for the plaintiffs on the ground that the contract was rescinded as from the writing of the letter by Dewhurst. [WIGHTMAN, J.—Are you obliged to rely on the doctrine alleged to be supported by *Atkin v. Barwick*, 1 Str. 165? Did not the plaintiff in this case signify his assent to the rescission by demanding the goods on the 6th of February?] Yes; but it will be said that at that time Horn had resolved to take to the goods. The plaintiff contends that Horn had not done so; he still desired to reject them, but referred the question of his right to do so to the law. If, however, the Court should *419] decide otherwise, then, from the argument *before relied on, it appears that the contract is to be considered as having been rescinded on the 4th February, and could not be set up again after that by Horn alone. But, further, the goods were stopped in transitu on the 6th of February. It will be objected that the transitus was ended, because the goods had arrived at the natural termination of the transit and were accepted by Horn; but the first point is not decisive, if Horn did not take to the goods as owner; and he never did accept them as owner. That the question is whether the vendee accepted as owner appears from *James v. Griffin*, 1 M. & W. 20,† in which the point was expressly decided. It will be said that in that case the goods were always at the wharfinger's, and that in this case they were on the vendee's premises: but it is said by Lord Abinger:(a) "I can conceive a case in which the receiving them into his own warehouse would not be a receiving into his own possession; as where, knowing his bankruptcy to be inevitable, he puts them apart from his other goods for the purpose of restoring them to the vendor." And in that same case, on a new trial,(b) it was further held that facts and statements of the vendee expressive of his intention were admissible in evidence to show his intention, although they were never made known to the vendor.

Hugh Hill and William Murray, contra.—The property in the hemp passed to Horn. The goods were shipped on his account according to a valid contract with him; and the bill of lading was forwarded. That passed the property and possession in those goods to him, subject only *420] to the vendor's right, on the vendee's insolvency, to *stop the goods in transitu. The argument urged to the contrary, on the other side, was urged and overruled in *Key v. Cotesworth*, 7 Exch. 595,† and *Wilmshurst v. Bowker*, 7 M. & Gr. 882 (E. C. L. R. vol. 49).(c) The only question therefore is, whether the property in the hemp was at any time before the assignment to the defendants divested out of

(a) Page 29.

(b) *James v. Griffin*, 2 M. & W. 623.†

(c) Reversing the judgments of C. B. in *Wilmshurst v. Bowker*, 5 New Ca. 541 (E. C. L. R. vol. 35), 2 M. & G. 792 (E. C. L. R. vol. 40).

Horn. There was no valid rescission of the contract of sale. To make a valid rescission there must be the consent to it of both parties. Therefore any intention to rescind or wish to rescind entertained by one of the parties, but not communicated to the other, is immaterial, and should not be admitted in evidence. Any acts or words therefore of Horn's not communicated to the defendants should not have been admitted in evidence, and, if admitted, were immaterial. The only evidence proper to be considered was the letter of the 4th of February from Horn to the defendants. The real question is, what is the construction of that letter? It is not, as alleged on the other side, an offer to rescind the contract. It is an assertion that Horn had at one time wished to rescind it and return the goods; and it may be an expression of a wish that he still could do so: but it is a declaration that he has been advised he could not return the goods, and that he had yielded to that advice, and would not. He expresses his sorrow at being obliged to come to such a determination, and speaks of the amount of probable dividend. That this was his construction of the letter appears from his subsequent refusal to deliver the goods. There was no valid stoppage in transitu, because on or before the 6th of February, when the goods were stopped, the transitus was at an end. At that time all the hemp was on *Horn's premises, and in his possession. He had the key [421 of the warehouse in which the hemp was placed. The actual transitus being thus clearly at an end, no evidence of Horn's intention was properly admissible. In *James v. Griffin*, 1 M. & W. 30,† it is said by Alderson, B.: "To defeat the right of stoppage in transitu, one of two things must appear: either the goods must arrive at the natural end of their journey, in which case I should rather think the intention of the vendee had nothing to do with the question; or, if the *transitus* is to be put an end to by something *intermediate*, then it is material to consider what that was, and with what intention it was done." But, if evidence of intention was admissible, the intention of Horn here was to be inferred from his acts and the letter of the 4th of February. The letter, for the reasons already given, is evidence of his intention to deal with the hemp as owner: and his refusal by his attorney to deliver the hemp to the defendants, his keeping the key and delivering it to his trustees, are conclusive proof that eventually, and before the demand by the plaintiff, he had resolved to accept, and did take to the goods as owner.(a)

Lord CAMPBELL, C. J.(b)—In this case, I own that my object in delaying judgment was to see whether we could, consistently with the rules of law, give judgment for the plaintiff. I confess that I should have a great inclination to do so if we could; because *one's feelings of [422 justice require that result; for the plaintiff had sold goods for which he was not to be paid; and the purchaser of the goods really was most anxious to do what was fair and honest, and to rescind the contract: and it is very hard that the plaintiff (the bill for the goods not being accepted, and he receiving no payment) should be deprived of his goods. But, on consideration, the impression which we had yesterday, that this could not be done consistently with the rules of law, remains. It is quite clear that the property in the hemp did once vest in Horn;

(a) The argument is reported by W. B. Brett, Esq.

(b) The case proceeded only to the close of the argument on November 9th; and the judges pronounced their opinions at the opening of the Court on November 10th.

for, when the goods were shipped by his order, and the bill of lading was signed, the property passed, subject to the right of the plaintiff, the consignor, to stop the goods in transitu upon the insolvency of the purchaser. Well, then, the property being in Horn, when was it divested from him? It did not remain in him after he executed the assignment for the benefit of his creditors; but I think that it was in him up to that time. There are only two modes in which it can be argued that the property was divested earlier. First, that there had been a rescission of the contract of sale; secondly, that there had been an exercise of the power of an unpaid vendor to stop in transitu. Now, on consideration, I think that neither ground of argument can be supported on the evidence. The contract could not be rescinded, any more than entered into, except with the mutual consent of the parties. Now I find no mutual consent on which the contract was rescinded. There is great difficulty in saying that Horn, in his letter of the 4th, made any offer to rescind. He expresses therein great regard for the plaintiff, and states what he would be willing to do; and the orders that he gave, that the *423] goods should not be brought upon his *premises, show a strong inclination on his part to rescind the contract; but I think it is impossible to say that in the letter of the 4th there was an offer to rescind the contract. Even if there had been, there seems great difficulty in saying that Horn, who still had the power of resiling (which is the term used by the Scotch lawyers), of changing his mind and taking a different course, did not change his mind. When the demand was made, he virtually refused to deliver the goods. Until there had been a full and mutual consent to rescind the contract each party had a right to draw back, and to refuse to consummate any offer for rescinding the contract. Now, when the demand was made of the goods upon the 6th, Horn virtually refused: he said he would be governed by his solicitor; which was a virtual refusal to deliver the goods. On the whole, therefore, it seems to me that the contract remained in full force. Then, that being so, the only other question is, Was the right to stop in transitu exercised? And that raises the question, were the goods in transitu on the 6th when this demand was made? I think the transit had come to an end. A mere delivery at the place of destination is not necessarily a termination of the transit; the transit remains until the goods have come into the possession of the consignee; and, although they are landed at the place to which they are destined, I think that, unless the consignee has taken possession of them, they are still in transit, and the consignor, on the insolvency of the consignee, may still exercise his right to stop them in transitu. I think it cannot be said that these goods ceased to be in transitu merely because they were put on *424] the premises of Horn; that, I think, would not *necessarily be a termination of the transit. But then, after they were put upon the premises, and before the 6th, he seems to have assented to their remaining there. It cannot then be said that they were not in his possession. If they were in his possession, the transit was gone. Therefore, upon the second ground equally with the first, there must be judgment for the defendant.

(COLERIDGE, J., had not been present during the argument.)

WIGHTMAN, J.—I am of the same opinion. The main question is what is the true construction of the letter of the 4th of February. Upon

the facts of the case, it appears that Horn, who was the consignee of the goods, down to the time of writing that letter continually objected to the receipt of the goods as an acceptance by him; they were placed, as it would seem, upon his premises without his concurrence, and, indeed, it may be taken upon the evidence, against his will, and that they so remained at the time he wrote that letter. The question in the case is, as my Lord Chief Justice had put it: first, whether the plaintiff is entitled on the ground of a right to stop in transitu; or whether he is entitled on the ground of the contract being absolutely rescinded. Now that will turn on what is the true effect of that letter; for, down to the time of writing that letter, it seems to me there was no acceptance, on the part of the purchaser, that would at all affect the question between the parties. But, on the 4th February, after the goods had been actually and bodily received upon the premises, and were placed there, though against the will, as it seems to me upon the *evidence, of [*425 Horn, he writes a letter which raises the great question between the parties. In it he says he found he could not go on with any prospect of success; and that a stoppage was determined on. "I sent" (he says) "for my solicitor, and got his answer, amongst other things, as to whether I could not, under the circumstances, return the hemp." He states, in the earlier part of his letter, it was on his premises, though he objected to take it; but he says that he consulted his solicitor, and, under the circumstances, he, the solicitor, was of opinion that he, Horn, could not return it. Now, the terms of that letter certainly of themselves would lead strongly to the inference that, however willing he might have been to have returned the goods to the plaintiff, yet that, on consulting his solicitor, he was told that the state of the case was such that he could not do so; and there his letter, for the purpose of the present question, ends. The plaintiff, however, seems to have considered that the effect of the letter was to effect a rescission of the contract, and to give the plaintiff the right to demand the goods back again. If there was any expression in the letter which might be considered so ambiguous as to leave the plaintiff the option of rescinding the contract or not, it might have been said that Horn had consented to return the goods, if he had returned them accordingly when demanded. But, entertaining the view he had taken on the advice of his solicitor, that he could not send the goods back again to the wharf, and that he could not do otherwise than deprive the plaintiff of what he considered the plaintiff's right, he refused, under the advice of his solicitor, to give up the goods. Whatever his original intention may have been as to the rescinding of the contract, and allowing the plaintiff to take the goods back *again, [*426 after the letter and the refusal to deliver them back it is impossible to say in this case that the parties have rescinded the contract. Even if there had been an offer to rescind made by Horn to the plaintiff, Horn would have had a locus penitentiae until the plaintiff had expressed his assent to that offer: till a demand was made by the plaintiff or something else done to express his assent Horn had undoubtedly a right to change his mind, and withdraw the offer if one had been made. Even, therefore, if the letter does amount to an offer to rescind the contract, there was afterwards a refusal to rescind and a refusal to deliver up the goods when they were demanded; so that there was no evidence of the rescission of the contract, so as to justify us in altering the

verdict on that ground. Is the plaintiff, then, entitled to a verdict on the ground of the right to stop in transitu? It seems to me that that raises very nearly the same question as before; because the goods had arrived at the place which was originally destined for them, namely the premises of Horn; and, when they were there, they were kept there; and Horn, according to the letter and the subsequent demand and refusal, did all that was necessary to determine the transit. The defendant, therefore, in this case is entitled to our judgment.

EARLE, J.—In this case the principles of law are as laid down by my Lord Chief Justice and my brother Wightman. The question, whether there was a rescinding of the contract or stoppage in transitu, depends on the letter of the 4th, and the demand and refusal on the 6th. I tried to consider the letter to amount to this: "My own wish is to rescind; but my solicitor informs me that, in point of law, I am not able to do *427] so;" and, if when *the demand had been made upon the 6th, Horn had given up the goods to the party, I think the letter would have been capable, by possibility, of that construction. I say by possibility; because, looking at the whole transaction, which is followed up by the letter to get back the goods, under the circumstances, the letter of the 4th being doubtful, it may amount only to this: "I wish I could give you your goods back again; but my solicitor tells me I cannot." But the plaintiff comes again on the 6th, and says, "Let me have my goods." Horn says, in answer to that, "I must refer you to my attorney." I think the meaning of that is: "I am perfectly master of the goods and my own acts and deeds; and, instead of deciding to let you have your goods, I appoint my attorney as my agent to decide for me." The attorney gave an answer for him, that he might not send back the goods. I cannot, by possibility, affirm truly that that amounted to a rescission of the contract and a repudiation of the goods. That is the question, ay or no: unless I can affirm that, I cannot give judgment for the plaintiff: it must, therefore, be for the defendants.

Rule absolute.

IN THE EXCHEQUER CHAMBER.

HEINEKEY, Appellant, v. EARLE and Others, Respondents.
[June 15, 1858.]

For syllabus, see ante, p. 410.

THIS case came on by way of appeal from the above judgment of the Court of Queen's Bench.

In Trinity Vacation, 1858,

*428] *Grove, for the appellant, argued as in the Court below.

William Murray, for the respondents, was not called upon.

WILLIAMS, J.—We are of opinion that the judgment of the Court below must be affirmed. Assuming that the contention on the part of the plaintiff is correct, that there may be a constructive transitus after the actual arrival of the goods at their place of destination, yet in this case it appears to us that Horn, the vendee of the goods, took to them, after their arrival, as owner. Whatever might have been the proper

interpretation of his acts prior to his letter of the 4th of February, about which I say nothing, yet that letter seems to me to express clearly that then Horn took to the goods as owner. It expresses sorrow that what he is doing must look like dishonesty; it says that he has consulted his solicitor whether he might return the goods; that his solicitor had advised him that he could not; that he was therefore sorry that he could not; that he did not know what dividend might come to the plaintiff. Then it is said that the contract was rescinded. But a rescission must be by mutual consent. And thus, again, this case is made to depend on the letter of the 4th of February. No other wish of Horn was made known to the plaintiff. If the construction of the letter were as contended for, no doubt there would be a rescission established, because it is clear that the plaintiff was willing to take back the goods. But, as the construction of the letter seems to us to be that which I have already expressed, there was no offer to rescind by Horn ever made known to *the plaintiff, [*429 and therefore no such offer ever accepted by him.

MARTIN, B., WILLES, J., BRAMWELL, B., WATSON, B., and BYLES, J., concurred. Judgment affirmed.(a)

(a) Reported by W. B. Brett, Esq.

The right of stoppage *in transitu*, ceases, of course, the instant that the goods come into the actual or constructive possession of the insolvent vendee, though he himself may be ignorant of the fact. As was said by Chief Justice Gibson, in *Greaner v. Mullen*, 15 Penna. St. 207, "acceptance always stands with the contract where there is not a specific declaration to the contrary." A question sometimes arises, however, as in the principal case, on respect to the power of the vendee, on discovering his insolvency, to refuse to receive or to return the goods, for the benefit of the vendor, but to the prejudice of the intervening rights of his own creditors. According to the American authorities, at least, stoppage *in transitu* does not amount to a rescission of the contract, but is merely an extension of the vendor's lien, which authorizes him to resume the possession but not the ownership of the goods: *Newhall v. Vargas*, 18 Maine 93; 15 Id. 314; *Rowley v. Bigelow*, 12 Pick. 313; *Stanton v. Eager*, 16 Pick. 474; *Jordan v. James*, 5 Ohio 98; *Howatt v. Davis*, 5 Munf. 34; *Hanse v. Judson*, 4 Dana 10. From

this point of view, it is plain that the single act of the vendee, even in enabling the vendor to regain his possession, can, by itself, have no effect to divest the property, which in most cases passes by the sale itself, or at least by delivery to the proper carrier. On the other hand, it is equally plain that there is nothing contrary to law or to morals in the vendee's facilitating the exercise of an undoubted right by the vendor.

Upon these principles, the question above stated seems tolerably well settled in the United States. Before the *transitus* is at an end, the vendee may notify the vendor of his insolvency, and refuse to receive the goods, or otherwise enable him to regain possession of them: *Ash v. Putnam*, 1 Hill, N. Y. 303; *Greaner v. Mullen*, 15 Penna. St. 200; *Naylor v. Dennie*, 8 Pick. 198; *Grant v. Hill*, 4 Gray 367. But as against the rights of an intermediate lien-creditor, it is necessary that the vendor should actually receive the goods, under circumstances which would have authorized him to stop *in transitu*: *Naylor v. Dennie*, 8 Pick. 198. When the goods have come into

the possession of the vendee, as the right of stoppage has ceased, a return of the goods by the vendee, can only be supported on the ground of a rescission of the sale. This, in the absence of a bankrupt law, or other law prohibiting preferences by insolvents, may doubtless be done, before any lien has attached. Thus in *Clemson v. Davidson*, 5 Binn. 392, 4 Id. 405, according to the finding of the jury, the parties, after the goods had actually been delivered and loaded on board a vessel designated by the vendee, when his insolvency became manifest, agreed to rescind the sale, and the vendee delivered the bill of parcels to the vendor, and requested him to go and take possession of the goods, which he did. It was held that the property was re-vested in the vendor, even as against a bona fide pledgee of the goods, who, however, under the circumstances, had acquired no specific lien. So in *Grant v. Hill*, 4 Gray 361, the goods had been actually delivered at a railway station designated by the vendee, and the latter in ignorance of this fact, on discovering his insolvency, made a bill of sale back to the vendors, delivered it to a third person to hold for them, and afterwards refused to accept the goods or pay freight on them. He then made application for his discharge as an insolvent, after which time, but before the appointment of the assignees, the vendors expressed their assent to the rescission, and obtained possession of the goods. The Court were strongly of opinion, though the decision was on

another ground, that the title of the vendors was good as against the assignees. See also *Stein v. Hutchinson*, 2 Ross Lead. Cases, Scotland 809. But, in general, in order that the rescission, which is in substance a resale, shall be effectual, there must be an actual assent thereto on the part of the vendor, before which the vendee may revoke, or the rights of creditors may attach: *Clemson v. Davidson*, ut supra. In *Greaner v. Mullen*, 15 Penna. St. 200, the goods were delivered to a wharfinger, after the vendees had become insolvent. They hesitated or declined to receive the goods, and refused to accept a draft for the price which had been sent with the bill of lading and invoice, but finally accepted it, and took possession of the goods. It was held that an execution-creditor of the vendees was entitled to preference to the vendor. Nor is the mere assent of the vendor sufficient, the rescission must be accompanied by the same formalities which were requisite for the original sale: *Quincy v. Tilton*, 5 Greenl. 277; *Chapman v. Searle*, 3 Pick. 38; *Miller v. Smith*, 1 Mason 437. Thus, if the case be otherwise within the statute of frauds, the rescission must be by an instrument in writing: *Chapman v. Searle*, ut supra: or at any rate there must be a redelivery, or what is equivalent thereto: *Miller v. Smith*, ut sup. Without this, the property still remains in the vendee, and is subject to execution by his creditors.

CORNILL v. HUDSON. Nov. 10.

SECT. 10 of The Mercantile Law Amendment Act, 1856) (19 & 20 Vict. c. 97), which enacts that a party who shall be entitled to bring an action limited by the Statutes of Limitation there mentioned, shall not be entitled to any time beyond the period so limited by reason of his having been imprisoned at the time when the cause of action accrued, applies to cases where the cause of action accrued before The Mercantile Law Amendment Act came into operation, and no action is commenced till after that.

THE first count of the declaration stated that defendant, at the time

after mentioned, being keeper of the prison called The Queen's Prison, was required by the Act of Parliament passed, &c. (5 & 6 Vict. c. 22, "For Consolidating The Queen's Bench, Fleet, and Marshalsea Prisons, and for regulating the Queen's Prison"), to apply, under the direction of one of Her Majesty's principal Secretaries of State, for the relief of the prisoners confined in the Queen's Prison, certain moneys provided under an Act of Parliament passed, &c. (53 G. 3, c. 113, "For providing relief for the poor prisoners confined in The King's Bench, Fleet, and Marshalsea Prisons"), and which were then in the hands of defendant for the purpose aforesaid. And the defendant being directed by the rules for the conduct and treatment of prisoners in the Queen's Prison, made and dated at Whitehall on the 13th November, 1843, and signed by one of Her Majesty's principal Secretaries of State, in obedience to the Act of Parliament first aforesaid, that he should see that debtors of class 2, who, under the last-mentioned Act of Parliament, made oath that they were not worth 10*l.* during the first *six [*430 months of their imprisonment be allowed 5*s.* per week, and during the second six months 3*s.* 6*d.* per week; and plaintiff being, on 26th January, 1844, committed as a debtor in execution to the custody of the defendant, and then duly making oath, in the form required by the said Acts of Parliament, that he was not worth 10*l.*, and remaining such prisoner, for more than twelve months then next ensuing, in the custody of the defendant, he was entitled all that time to be treated by defendant as a debtor of the second class, and was lawfully entitled to the said sums of 5*s.* per week for the first six months, and to the said sum of 3*s.* 6*d.* per week for the second six months of his said imprisonment: and, although defendant, in obedience to the said direction, paid or allowed to plaintiff the said sums during certain portions of the time, and portions of the said sums at other times, yet such allowances by him were mainly deficient; and plaintiff was so paid or allowed only sums amounting in the whole to 2*l.* 8*s.*: that the omission to make the full and due allowances aforesaid was by the order and direction of defendant, not regarding his duty under the said Acts of Parliament and rules, and was wilful and malicious, with intent to injure plaintiff, and done in tyranny and cruelty, and without regard to the life of plaintiff, and without any reasonable or probable cause whatever; but alleging, as an excuse, that plaintiff had been taken into custody by an order of one of Her Majesty's principal Secretaries of State.

Second count: That plaintiff, being such debtor of the second class, and having made the said oath, and being entitled to the said allowance in money, was also entitled to an allowance of necessary fuel, furniture, and bed-room utensils, under and by authority of the same *rules: [*431 and defendant, being such keeper of the Queen's Prison, and further disregarding his duty, and intending to injure the plaintiff, wilfully and maliciously and cruelly refused to allow any of the said necessary fuel or bedding to plaintiff for a long space of time, and then, having allowed them, seized and took them away from plaintiff; and plaintiff, remaining such prisoner in defendant's custody for more than twelve years afterwards, was, during all that time, in awe of the defendant and deterred from bringing this action, and was, by defendant, so deprived of the said bedding and furniture during the whole of that time and until within the present year. By means of which cruel and tyrannical

nical non-payment of money, and other cruelties aforesaid, the plaintiff suffered very great privations, &c.

Plea 4, to first count. That, after plaintiff became and was a prisoner, and before the committing or happening of the wrongful acts in that count complained of, and at and during the times of the committing or happening of the same, plaintiff was entitled to be discharged under an Act for the relief of Insolvent Debtors.

Demurrer. Joinder.

Plea 7, to both counts. That the said causes of action did not accrue within six years before the commencement of this suit.

Replication. That, at the time when the said causes of action accrued, plaintiff was imprisoned within the true intent and meaning of the statute in such case made; and he hath been, from thence until within six years before this suit, imprisoned as aforesaid, and not at large; and he has commenced this suit within six years next after his becoming at *432] large; and that the *said causes of action accrued, and the said imprisonment occurred, before the passing of The Mercantile Law Amendment Act, 1856.

Demurrer. Joinder.

P. M' Mahon, for the plaintiff.—The fourth plea is founded on sect. 13 of stat. 53 G. 3, c. 113, which enacts "That no prisoners shall be relieved by virtue of this Act, who shall have become supersedeable, or entitled to be discharged under any Act for the relief of Insolvent Debtors." It is certainly difficult to support the demurrer to this plea, unless the plaintiff is entitled to insist that, if he chooses to remain in prison in fact, although entitled to be discharged, he may claim to be relieved under the Act. That may perhaps be straining the enactment.

As to the demurrer to the replication to the seventh plea. The Statute of Limitations, 21 Ja. 1, c. 16, s. 7, allows six years from the determination of the imprisonment. But the defendant will contend that by sect. 10 of The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), imprisonment has not now the effect of giving a longer time for the commencement of an action. The replication, however, alleges that the causes of action accrued before the passing of that Act. So that the question is whether the enactment is retrospective: if it is, the plaintiff must fail. Now, if it were retrospective, the result would be that a party who was in prison at the time of the passing of the Act, and had been so at the time of the accruing of the cause of action and six years after that, would be entirely without remedy. Yet the Legislature cannot have intended to destroy such a right; for in sect. 3 it limits the enactment as to *433] *promises for the debt, &c., of another to promises made after the passing of the Act: and, in sect. 9, actions in the case of merchant's accounts are allowed six years after the passing of the Act; and the clause last mentioned is the only one which expressly applies to bygone causes of action. The remarks of Lord Denman, on a similar enactment in stat. 3 & 4 W. 4, c. 27, s. 7, in *Doe dem. Evans v. Page*, 5 Q. B. 767 (E. C. L. R. vol. 48), are applicable. The presumption is strongly against giving a retrospective effect to enactments. In *Gilmore v. Shuter*, 2 Lev. 227, S. C. 1 Vent. 330. 2 Mod. 310, it was held that the words of the Statute of Frauds, 29 C. 2, c. 3, s. 4, "no action shall be brought" "to charge any person upon any agreement made in consideration of marriage," "unless the agreement

upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c., did not apply to an action brought, after the Act came into operation, upon a promise made before.

Hannen, contra.—As to the fourth plea. [Lord CAMPBELL, C. J.—That point is not arguable: the plea uses the very words of the Act. COLERIDGE, J.—The suggestion on the other side really seeks to give effect to a fraud on the statute.] It is therefore unnecessary to discuss this demurrer; so that the first count is answered.

The seventh plea is pleaded to both counts. It is true that in general the presumption is in favour of giving only a prospective effect to statutes: but the question is always as to the construction of the statute, and the intention of the Legislature. The language of sect. 10 of stat. 19 & 20 Vict. c. 97, is: "No person or *persons who shall be [434 entitled to any action or suit with respect to which the time of limitation within which the same shall be brought is fixed by Act of the twenty-first year of the reign of King James the First, chapter sixteen, section three, or" other Acts there mentioned, "shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which by virtue of any of the aforesaid enactments imprisonment is now a disability, by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued." The enactment applies to persons who shall be entitled: one who was entitled before the Act passed will also be entitled after it has passed. The decisions on stat. 21 Ja. 1, c. 16, were forced. "Trespass" "upon the case," in sect. 3, was made to comprehend assumpsit: in sect. 7, "trespass" alone was held to apply to assumpsit, even for unliquidated damages; but it has been said by the Judges that this construction was strained and would not now be adopted if the question were *res integra*: *Piggott v. Rush*, 4 A. & E. 912 (E. C. L. R. vol. 31). There can be no reason for supposing that the Legislature would act timidly in altering a law so established. As to *Doe dem. Evans v. Page*, 5 Q. B. 767 (E. C. L. R. vol. 48), the language of sect. 7 of stat. 3 & 4 W. 4, c. 27, is, "when any person shall be in possession," &c., which could not, as Lord Denman points out, apply to a *tenancy [435 determined before the Act passed. Sect. 14 of stat. 19 & 20 Vict. c. 97, clearly takes away the effect of antecedent payments by one of two co-contractors as against the other: that was decided by *Kindersley, V. C.*, in *Thompson v. Waithman*, 3 Drewr. 628. In *Towler v. Chatterton*, 6 Bing. 258 (E. C. L. R. vol. 19), stat. 9 G. 4, c. 14, s. 1, which requires that an acknowledgment, to prevent the operation of the Statute of Limitations, must be in writing, was held to apply to acknowledgments made before the Act came into operation. [COLERIDGE, J.—It is pointed out in the judgment that sect. 10 of that Act postpones the operation of the Act for the purpose of enabling parties to bring their actions in time.] That was only one reason assigned for the judgment; and, considering how little time was given, about seven months, this consideration would not of itself have determined the result. There can be no especial reason for favouring the exception in

case of imprisonment: the imprisonment does not prevent bringing an action.

P. M Mahon, in reply.—The demurrer to the fourth plea is not insisted on.

As to the seventh plea, it will be found that, where statutes are construed retrospectively, the language is different from that of the clause now under consideration. Thus in *Freeman v. Moyes*, 1 A. & E. 338 (E. C. L. R. vol. 28), it was held that the words of stat. 3 & 4 W. 4, c. 42, s. 31, which gives costs to defendants "in every action brought by any executor or administrator in right of the testator or intestate," *436] applies to actions which, at the time of the statute coming into operation, had been "brought," though not tried. Reference has been made to the decision in *Thompson v. Waithman*, 3 Drewr. 628, upon sect. 14 of stat. 19 & 20 Vict. c. 97: but the words there are "shall lose the benefit," which are distinguishable from those in sect. 10. In *Doe dem. Evans v. Page*, 5 Q. B. 767 (E. C. L. R. vol. 48), Lord Denman points out that a retrospective operation of the clause which he was considering "would cause the greatest hardship: for a person, who, as the law stood before the passing of the Act, was in ample time to bring his ejectment and recover property that undoubtedly was his, would by the operation of the statute be suddenly deprived of the means of asserting his right, there being no clause for the postponement of the operation of the statute for such a period as would enable persons, who would be otherwise affected by it, to assert their rights." Those remarks apply exactly to the present case. If such a retrospective effect had been intended here, the words would have been "are or shall be entitled." *Towler v. Chatterton*, 6 Bing. 258 (E. C. L. R. vol. 19), was decided upon an enactment relating to evidence to be given: the effect allowed to it was not, properly speaking, retrospective, though the evidence, when given, related to what was past.

Lord CAMPBELL, C. J.—As to the fourth plea there can be no doubt: it is very properly allowed that on the demurrer to this the defendant must have judgment. As to the seventh plea: I am of opinion that sect. 10 of stat. 19 & 20 Vict. c. 97, prevents any action being commenced after *437] the period has elapsed within which, *if the prisoner had been at large, he must have sued. That is the grammatical construction of the section, as it appears to me: that, after the day on which the statute receives the Royal assent (29th July, 1856), no person, who shall be entitled to any action with respect to which the limitation is fixed by the statutes mentioned, shall be entitled to any time within which to commence the action, beyond the period fixed by those, by reason only of his having been imprisoned when the cause of action accrued. There is no retrospective operation on actions already commenced. We must here consider the plaintiff, in the contemplation of the enactment, as one who *should* be entitled to the action, and commencing it after the statute came into operation: he clearly is within the scope of the enactment according to its grammatical and natural construction. The cases cited merely show that we are to find out the intention of the Legislature in each particular Act: that is all which the decisions establish; and by that rule I construe stat. 19 & 20 Vict. c. 97, s. 10. The intention was to prevent actions thereafter to be brought whether on past or future transactions. Does that tend to injustice? I see none. It only car-

ries out what was probably the intention of the Legislature, that persons should not, by merely remaining abroad, now that travelling is so easy and directions are so readily transmitted, be enabled indefinitely to prolong the time within which they may commence their actions. The period might extend to fifty years. Then, as to imprisonment. An imprisonment of six years for crime is extremely rare in this country: persons might often commit the grossest injustice by remaining voluntarily in prison to keep alive the right of action. The Legislature intended to prevent this vexatious *prolongation of the right. I see no injustice in this intention, which may fairly be collected [*438 from the words of the 10th section.

COLERIDGE, J.—I am of the same opinion, and have nothing to add to what my Lord has said.

WIGHTMAN, J.—I am of the same opinion, and have nothing to add.

ERLE, J.—I am of the same opinion. I will merely add that the Legislature appears to have considered the statutes of limitations to be enactments in furtherance of justice. They have intended to take away absolutely every impediment to the operation of these enactments in every case. The decision by Vice-Chancellor Kindersley(a) is in exact analogy to our present decision. Where it is intended to keep the right of action alive after the coming into operation of the Act, express provision is made, as in sect. 9. We are bound to give effect to the intention of the Legislature.

Judgment for defendant on both demurrers.

(a) *Thompson v. Waithman*, 3 Drewr. 628.

***WALKER v. The QUEEN, in error. Nov. 11. [*439**

Indictment for perjury charged that a petition for protection from process was, under stats. 5 & 6 Vict. c. 116, 7 & 8 Vict. c. 96, and 10 & 11 Vict. c. 102 (Insolvent Debtors' Acts), filed and presented at the county court of S. at W. by defendant; that he afterwards obtained an order of protection; that afterwards, while the proceedings were pending in the said county court, to wit, at the time of filing the petition and schedule, he came before K., a commissioner to administer oaths in Chancery (duly appointed and empowered to act in the matter of the insolvent, and take defendant's oath then and there), at the county court, and within the jurisdiction aforesaid, for the purpose of making an affidavit and verifying his petition on oath, and was duly sworn before K., and swore and took his oath that the affidavit then made was true, K. having competent power and authority to administer the oath. The indictment then alleged that certain matter was material in the matter of the insolvency, and that the affidavit was false in respect thereof. Defendant was convicted, and judgment passed. Held, on error, that the jurisdiction of the Court sufficiently appeared, though there was no express allegation that defendant had resided, for six calendar months before the filing of the petition, within the district of the county court, as required by sect. 6 of stat. 11 & 12 Vict. c. 102.

THE plaintiff in error was indicted at the Staffordshire Assizes, 13th March, 20 Vict. (1857). The first count of the indictment charged that, on 26th January, 1857, "a petition for protection from process was, under and in pursuance of the statutes made and passed in the fifth and sixth, seventh and eighth, tenth and eleventh, years of the Reign of Her present Majesty, intituled, respectively, 'An Act for the relief of Insolvent Debtors',(a) 'An Act to amend the law of Insolvency, Bank-

(a) 5 & 6 Vict. c. 116.

ruptcy, and Execution,'(a) and 'An Act to abolish the Court of Review in Bankruptcy, and to make alterations in the jurisdiction of the Courts of Bankruptcy and Court for relief of Insolvent Debtors,'(b) filed and prosecuted in the county court of Staffordshire at Wolverhampton, by one William Kempson Walker; and that the said W. K. Walker afterwards, to wit, on the day aforesaid in the year aforesaid, duly received *440] an order *for protection from all process whatever except as in the said order mentioned, either against his person or his property of every description: which protection was to continue in force, and all process (except process for arresting or holding him to bail under the authority of a Judge's order for that purpose) to be stayed until the 24th day of March, 1857, at ten o'clock in the forenoon, being the time appointed for his first examination under and within the meaning of the said statutes." "That afterwards, and whilst the proceedings upon and in respect of the said insolvency were depending in the said county court of Staffordshire at Wolverhampton, to wit, at the time of filing the said petition and the schedule, the said W. K. Walker came before Henry Kitson, gentleman, at the Court at Wolverhampton, and within the jurisdiction aforesaid, for the purpose of making an affidavit and verifying upon oath his petition and schedule thereunto annexed, and the several matters therein contained (he the said H. Kitson then being a commissioner to administer oaths in Chancery in England, and duly appointed and empowered to act in the matter of the said insolvency, and to take the oath of the said W. K. Walker), then and there, before the said H. Kitson, was duly sworn and took his corporal oath that the affidavit that he then and there made was true (he, the said H. Kitson, then and there having competent power and authority to administer the said oath to the said W. K. Walker in that behalf)." "That, at and upon the making of the said affidavit by the said W. K. Walker, and at the time the said W. K. Walker so made his affidavit, and swore as hereinafter mentioned, it then and there became and was material in and to the matter of the said insolvency to inquire into the estate and *441] *effects of the said W. K. Walker, and into the claim against the same, and, especially, whether the debts owing by the said W. K. Walker amounted to a less sum than 300*l.*, whether the said schedule to his said petition annexed contained a full and true account of the debts of the said W. K. Walker, and the claims against him, with the names of his creditors and claimants, and the dates of his contracting the debts and claims severally, as nearly as such dates could be stated." "That the said W. K. Walker, being so sworn as aforesaid, did then and there, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously, before the said H. Kitson, make his affidavit and swear in substance and to the effect following; that is to say: That the several allegations in the said petition (meaning the aforesaid petition for protection from process), and the several matters contained in the schedule thereunder annexed, were true; and that he the said W. K. Walker was a trader within the meaning of the statutes then and now in force relating to bankruptcy, but owing a less sum than 300*l.*; and that he, the said W. K. Walker, had examined the said schedule; and that the said schedule contained a full and true account of the debts of the said W. K. Walker, and the claims against him, with the names of

his creditors and claimants, and the dates of contracting the debts and claims severally, as nearly as such dates could be stated, the nature of the debts and claims, and securities (if any) given for the same; and especially that he, the said W. K. Walker, was indebted to the Local Board of Health for the borough of Wolverhampton in the sum of 63*l*. Whereas, in truth and in fact, the several allegations contained in the said petition (meaning the aforesaid petition for protection from process and the *several matters contained in the schedule thereunto [*442 annexed) were not true, as he the said W. K. Walker, at the time that he made his affidavit and swore as aforesaid, then and there well knew; and whereas, in truth and in fact, the said W. K. Walker, at the time that he so made his affidavit and swore as aforesaid, did not owe a less sum than 300*l*., but was indebted in a much larger sum than 300*l*., to wit, the sum of 1520*l*., as he, the said W. K. Walker, at the time that he made his affidavit and swore as aforesaid, then and there well knew; And whereas, in truth and in fact, the said schedule, at the time that he the said W. K. Walker so made his affidavit and swore as aforesaid, did not contain a full and true account of the debts of the said W. K. Walker, and the claims against him, with the names of his creditors and claimants, and the dates of contracting the debts and claims severally, as nearly as such dates could be stated; And whereas, in truth and in fact, the said W. K. Walker, at the time he so made his affidavit and swore as aforesaid, was indebted to The Wolverhampton and Staffordshire Banking Company in the sum of 920*l*.; And whereas, in truth and in fact, the said W. K. Walker, at the time he so made his affidavit and swore as aforesaid, was indebted to," &c. (setting out several debts); "And whereas, in truth and in fact, the said debts to the said Wolverhampton and Staffordshire Banking Company, to," &c. (the other debts), "respectively, were not, nor were any of them, contained in the said schedule, as he, the said W. K. Walker, at the time that he so made his affidavit and swore as aforesaid, then and there well knew; And whereas, in truth and in fact, the said W. K. Walker was indebted to the Local Board of Health of Wolverhampton in the sum of 97*l*. 10*s*., and not in the sum of 63*l*. as *was in the said schedule [*443 alleged, as he, the said W. K. Walker, at the time that he made his affidavit and swore as aforesaid, then and there well knew. Against the peace," &c.

The defendant pleaded Not guilty to this count. Verdict of Guilty; and judgment thereon. Error. Joinder in error.

P. M. Mahon, for the plaintiff in error.—The first count shows no jurisdiction in the court to administer the oath. The county courts have jurisdiction to entertain the petition in cases only "wherein the insolvent or defendant shall have resided elsewhere" than within the district within which the Court for the relief of Insolvent Debtors has jurisdiction, "and shall have resided for six calendar months next immediately preceding the time of filing his petition, or the suing out of any summons within the district of such county court to which such insolvent shall prefer his petition, or to which any plaintiff shall apply for any summons as aforesaid;" stat. 10 & 11 Vict. c. 102, s. 6, which altered the law of jurisdiction as it previously existed under stats. 5 & 6 Vict. c. 116, s. 1, and 7 & 8 Vict. c. 96, s. 1. Now, as this is a proceeding, not under the general jurisdiction of a Superior Court, but

under a jurisdiction given only under special circumstances, the indictment, if it does not show such circumstances, shows no jurisdiction. There ought therefore to be a direct allegation of such a residence as is required by stat. 10 & 11 Vict. c. 102, s. 6; but no such allegation appears. [Lord CAMPBELL, C. J.—It is alleged that the petition was presented in pursuance of the statutes.] That is not a sufficient allegation of facts satisfying the statutes: the *jury cannot try the *444] truth of an allegation of a legal result. [WIGHTMAN, J.—Suppose the petitioner, not so residing in fact, had sworn in his petition that he did: would that be perjury?] It would, certainly, under stat. 7 & 8 Vict. c. 96, s. 40, which must be construed with the later Act. [Lord CAMPBELL, C. J.—Then such a petition would give the Court jurisdiction to inquire into the truth of the petition in that respect.] The indictment, in such a case, should state that the petition did so assert. [Lord CAMPBELL, C. J.—If the petition must state the residence, then the allegation in the indictment imports that the petition did so state.]

Scotland, for the Crown, was not called upon.

Lord CAMPBELL, C. J.—The judgment must be affirmed.

COLERIDGE, J.—Another question might arise, if it appeared in evidence that the petitioner did not so reside.

WIGHTMAN, J., concurred.

(ERLE, J. was absent.)

Judgment affirmed.

*445] *The QUEEN v. STANTON. Nov. 11.

The exemption given by stat. 6 G. 4, c. 125, s. 59, from the necessity of employing licensed pilots, to masters piloting their own ships on the voyages there specified, without the aid of an unlicensed pilot, is continued by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), sect. 353; and this exemption applies as well to ships carrying, as to ships not carrying passengers, and is not affected by the exemption given in sect. 379 of the same Act to ships on particular voyages not carrying passengers.

THIS was a special case stated (pursuant to stat. 12 & 13 Vict. c. 45, s. 11, after notice of appeal, given to the Court of Quarter Sessions of the borough of Gravesend, Kent, against the conviction after mentioned) for the opinion of this Court as to the validity of a judgment or conviction under The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, ss. 353, 376), on the summons of Frederick Banks, the respondent, against Thomas Stanton, the appellant, by and before two justices of that borough:

For that, on 28th June, 1857, in the river Thames and within the jurisdiction of the said justices, the said appellant assumed and continued in the charge, and acted as pilot, of a certain steamship called The Berwick, then and there navigating within the London pilotage district, when and whilst the said ship was carrying passengers, after the said respondent, then and there being a duly qualified pilot, had offered to take charge of the said ship, he the said appellant not being then and there a duly qualified pilot, and not having a certificate from any pilotage authority enabling him to pilot the said ship. And the said appellant was thereupon, on the 29th day of July, convicted of the

said alleged offence, and adjudged to pay the penalty or sum of 12*l.* 13*s.*, being double the amount of the pilotage demandable for the conduct of such ship, together with the sum of *1*l.* 6*s.* for costs. And the said parties have respectively agreed to waive any and [*446 every formal technical objection which might have been taken on either side; and, in the event of the said conviction being upheld, that the said respondent should forego his claim to double pilotage or any other sum or penalty which he may be entitled to recover from the said appellant or the owner of the said steamship in respect of the matters herein mentioned, and should accept the sum of 6*l.* 6*s.* 6*d.*, being the amount of single pilotage, in lieu thereof.

The facts are as follows.

The said appellant, on the said 28th day of June, was the master in command on board the said steamship *Berwick*. The said steamship had been for a long time previously, and was on the 28th day of June aforesaid, a regular trader to the Baltic: and, on that day, was navigating on the river Thames (within the London district of the Trinity House, in which the employment of pilots was then compulsory), proceeding, and was carrying passengers, on her outward voyage to Copenhagen and St. Petersburg, in the Baltic Sea, both being places in Europe north of Boulogne. The said respondent, on the 28th day of June aforesaid, was a duly qualified pilot for the London district; and, whilst the said steamship was so navigating and carrying passengers within the said district on her said outward voyage, he offered to take charge, as pilot, of the said steamship. The said appellant refused to employ the said respondent as pilot; and, after such offer and refusal, he continued in charge of the said steamship, and did pilot the said steamship within the district aforesaid. At the time of his so refusing to employ the said respondent, and of his so afterwards continuing in charge and to *pilot the said steamship as aforesaid, the said appellant had not, [*447 nor had his mate, any pilotage or other certificate or authority, according to the provisions of the said Merchant Shipping Act, enabling him or his mate to pilot the said steamship within such district aforesaid, but was otherwise duly qualified to act as master of the said ship.

The question for the opinion of the Court is: Whether the said steamship, at the time the said respondent offered his services as such pilot as aforesaid, being then a trader to the Baltic carrying passengers, and on her outward voyage thereto, was or was not exempt from compulsory pilotage within the provisions of stat. 52 G. 3, c. 39, s. 2, or of stat. 6 G. 4, c. 125, s. 59, and of The Merchant Shipping Act, 1854.

If the Court shall be of opinion in the affirmative, then judgment shall be entered for the appellant at the quarter sessions, &c. If the Court shall be of opinion in the negative, then judgment shall be entered in like manner for the respondent, &c.

The counsel agreed that the case should be amended by adding a finding that the vessel was duly British registered, coming up by the North Channel.

T. W. Saunders, in support of the conviction.—The question turns on sects. 353 and 379 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104). Sect. 353 enacts that, “subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory

in all districts in which the same was by law compulsory before the time
 *448] when this Act came into operation; and all exemptions from
 *customary pilotage then existing within such districts shall also
 continue in force:" and then follows the imposition of the penalty in the
 case of a master of an unexempted ship who navigates within such district
 without possessing a pilotage certificate, or who employs an unqualified
 pilot, after a qualified pilot has offered himself. Then, sect. 58 of
 stat. 6 G. 4, c. 125 (which was in force up to the coming into operation
 of The Merchant Shipping Act, 1854), imposed a penalty upon any master
 of a ship acting as a pilot within the limits specified in the Act (which
 include the Thames where the vessel in this case was navigating), or
 employing an unlicensed pilot after a licensed pilot has offered himself;
 which was followed by sect. 59, whereby it is provided that the master
 of any vessel trading to the Baltic, having a British register and coming
 up by the North Channel, "shall and may lawfully, and without being
 subject to any of the penalties by this Act imposed, conduct or pilot his
 own ship or vessel when and so long as he shall conduct or pilot the same
 without the aid or assistance of any unlicensed pilot or other person or
 persons than the ordinary crew of the said ship or vessel." So far as
 these enactments go, their joint effect would be to exempt the appellant.
 But sect. 379 of The Merchant Shipping Act, 1854, enacts that "The
 following ships, when not carrying passengers, shall be exempted from
 compulsory pilotage in the London District, and in the Trinity House
 Outport Districts;" and in the list which follows is "(3) Ships trading
 to Boulogne or to any place in Europe north of Boulogne." This is an
 exemption which would have applied to the present case if the ship had
 not carried passengers: and it clearly imports that ships trading to places
 *449] in Europe north of *Boulogne, which do carry passengers, shall
 not be exempt; the object being to protect the lives of passengers
 by excluding passenger ships from the exemption. This, if it be (as
 perhaps it is) inconsistent to some extent with sect. 353, qualifies sect.
 353 to that extent; otherwise the distinction as to passengers would be
 unnecessary.

Hugh Hill, *contrà*.—The exemption in sect. 353 is applicable. Sect.
 354 is inapplicable: that takes out of the exemption ships carrying
 passengers on voyages not including that in which the ship was engaged
 in the present case. Sect. 376 imposes a penalty in certain cases,
 additional to that imposed by sect. 353, subject "to the exemptions herein-
 after contained;" and it is to this that the exemptions in sect. 379 apply.
 There is nothing in sect. 379 to repeal the exemptions given by sect. 353.
 It is to be observed that, under sect. 353, incorporating for this purpose
 sect. 59 of stat. 6 G. 4, c. 125, the exemption is allowed only to the master
 piloting the ship "without the aid or assistance of any unlicensed pilot;"
 but sect. 379 gives the exemption from the penalty of sect. 376 without
 any such qualification.

T. W. Saunders was heard in reply.

Lord CAMPBELL, C. J.—We are called upon to say that the Act of
 Parliament, by an implication by no means necessary, imposes a penalty
 in sect. 379. Mr. *Saunders* properly allows that sect. 353 continues
 the exemption of stat. 6 G. 4, c. 125, s. 59. It does so, in all the
 *450] original latitude of the exemption. Mr. *Saunders* *therefore
 admits that he finds nothing to aid him till he comes to sect. 379.

That extends an exemption; but it adds no penalty. It goes further than the preceding Acts. Express language would be required to take away the exemption in sect. 353.

COLERIDGE, J.—I am of the same opinion. We are called on to do that which nothing but absolute necessity would warrant us in doing: that is, when the exemption given by stat. 6 G. 4, c. 125, s. 59, is expressly continued by sect. 353 of The Merchant Shipping Act, 1854, to suppose that this is repealed by sect. 379. Is there such an absolute necessity? And that, when the effect will be to create a new offence and impose a penalty? I see none. Sect. 59 of stat. 6 G. 4, c. 125, gives the exemption in the case where the master himself pilots, and there is no unlicensed pilot on board: but sect. 379 of The Merchant Shipping Act, 1854, makes a distinction between ships carrying and ships not carrying passengers. Taking Mr. *Saunders's* view, that the object was to protect passengers, this extends the exemption in the case where there are no passengers, so far as regards the voyages which are the subject of the enactment in sect. 376; and these clauses may well stand together with sect. 353.

WIGHTMAN, J.—The question turns on the sections of The Merchant Shipping Act, 1854. If we had only sect. 353, it is clear that there would be an exemption. But it is said that sect. 379 takes this away. From its language, it rather has the appearance of extending the exemption. But it is suggested that, by reasonable inference, it limits the exemption to cases where passengers are not carried. But I think it carries the exemption further than was done before, and [*451 enumerates fresh objects of exemption.

(ERLE, J., was absent.)

Conviction quashed.

FLANNAGAN v. The Overseers of the Poor of the Parish of BISHOP WEARMOUTH. Nov. 11.

Upon conviction of a man, under stat. 5 G. 4, c. 83, s. 3, for wilfully refusing or neglecting to maintain his wife, a case was stated by the magistrates under stat. 20 & 21 Vict. c. 43, s. 2. The statement was that it appeared on the hearing that appellant on a former occasion, his wife having before that been relieved by the parish while living apart from him, had been summoned, and had then promised to make her a weekly allowance, which he had since failed to do, and the wife had been supported by the parish since then. That, at the hearing on which the conviction appealed against took place, he offered to repay what the parish had paid, and to receive his wife; that evidence was given to the satisfaction of the magistrates that he had ill used his wife, who thereupon refused to live with him; that appellant undertook to treat her kindly; that the magistrates were satisfied that he had for a length of time neglected to support her, and that the offer to receive her was only to screen himself from the consequences of the neglect.

Held, that the conviction was wrong, for that, assuming the fact of ill usage sufficient to constitute a ground for the wife's refusal to live with the appellant, there was no evidence of a refusal to support her.

THIS was a case submitted for the opinion of this Court, under stat. 20 & 21 Vict. c. 43, s. 2, by justices of the borough of Sunderland.

At the Police Court, Bishop Wearmouth, in the said borough, before two justices of the said borough, on 10th September, 1857, Benjamin Flannagan was charged, under stat. 5 G. 4, c. 83, s. 3, for wilfully refusing or neglecting to maintain his wife, whereby she had become

chargeable to the parish of Bishop Wearmouth. The overseer of Bishop Wearmouth proved that the wife of the defendant had applied to him for relief, and that he had advanced to her the sum of one shilling for *452] that *purpose. The wife of the defendant proved that she had received no money from the defendant for several weeks, and had been compelled to apply for relief to the parish, as her mother was unwilling to be burthened with her support. On cross examination by the defendant's attorney, she admitted that she was living with her mother, who kept a small shop, whereby her mother supported herself and other three children who lived with her in the same house. It was also in evidence before the magistrates that the defendant had been summoned on a similar charge a few weeks previously, when the defendant repaid the parish officer the sum of one shilling then advanced (it being usual with the parish officer to relieve with a small sum with the view to bring the husband before the justices); defendant also paid the costs incurred, and undertook to pay the sum of twelve shillings a week to his wife for her future support: but the defendant, though of sufficient ability, never made a single payment to his wife of such weekly allowance, or any other payment whatever. On the hearing, the defendant, by his attorney, denied that he had wilfully refused or neglected to maintain his wife, and urged that the advance made by the overseer was but colourable, and proffered to maintain his wife if she would leave her mother's home (where, however, he himself in the first instance took her and for some time lived with her), and would come and live with him: but he admitted that he had no house of his own to reside in, he staying, when not at sea, with his father. This his wife refused to do, alleging that he had assaulted her and used her very ill without the slightest *453] cause, and that she was afraid to live with her husband alone on *account of such ill usage. And, though the defendant denied this, the magistrates were satisfied that he had been guilty of ill usage. No other proof of cruelty was adduced on this present hearing; but the same magistrates had, on the former hearing, other and confirmatory evidence of the wife of the ill usage: and not the slightest imputation on the conduct or character of the wife was for one moment suggested by the defendant, to account for his ill usage. The defendant, through his attorney, at the close of the case for the parish, offered to refund the sum advanced by the parish, and to pay the costs of the present hearing, but gave notice that the defendant would not consider himself liable for further advances, inasmuch as he was willing to provide a house for his wife to live with him, and maintain her, and undertaking to treat her kindly and properly. The magistrates, however, being fully satisfied, on the evidence produced before them, that the defendant had for a length of time neglected to support his wife, who had, on this and the former occasion, from inability to support herself, been compelled to apply to the parish for relief, that the defendant was abundantly able to support himself and wife, and to make the payment per week to her before referred to, the neglect of which caused the last application to the overseers, and, moreover, that he had been guilty of the ill usage complained of, and that the offer to take her to live with him was only made to screen himself from the consequence of his continued neglect, concurred with the overseers in considering that the defendant's proposals were not such as should induce the parish to forego the prosecution, and therefore con-

victed the defendant of the offence charged, and sentenced him to be committed to the House of *Correction at Durham for one month. The defendant, however, was, the same day, liberated after entering into the requisite recognisances, having, through his attorney, applied for a case to be stated for the opinion of this Court. [*454]

And the question for the opinion of the Court is, Whether, under the foregoing circumstances, the conviction is right.

Bliss, in support of the conviction.—First, the appellant, on the 10th of September, had, in fact, wilfully refused and neglected, for a period up to that time at least, to maintain his wife, and has therefore committed the offence created by stat. 5 G. 4, c. 83, s. 3. No subsequent maintenance of the wife, and, a fortiori, no offer to maintain her for the future, could have the effect of purging the bygone offence. It is not therefore necessary to consider whether, after such offence, the offer to take back his wife would have the effect of relieving him from a new charge under this section. But, secondly, if it were necessary to consider that point, it is clear that, as the facts are here shown, such an offer would be no excuse. The appellant, it is true, could be liable under the statute only in cases where he might have been made civilly liable for goods supplied to the wife: *Rex v. Flintan*, 1 B. & Ad. 227 (E. C. L. R. vol. 20); and, if there had been a bona fide offer to take back the wife, he could not be made either civilly or criminally liable as for neglect subsequent to such offer. But the magistrates find the offer not to be bona fide, but only colourable: and their finding on the facts is conclusive. And, as far as can be judged from *the other [*455] facts stated, this finding is quite reasonable. Indeed, as he was guilty of such cruelty as to make it unsafe for the wife to reside with him, he would be liable within the principle of *Rex v. Flintan*.

C. Milward, *contra*, was not called upon.

Lord CAMPBELL, C. J.—This is a case brought before us under the recent statute; and it illustrates strongly the beneficial operation of that statute. But for that statute, this conviction, being within the jurisdiction of the magistrates, must have been good; and there would have been no remedy. But the justices have stated a case for our opinion upon a point of law. Here is a husband who promises to make his wife an allowance, but does not make it, and asks her to live with him, which she refuses. I assume that this is a case in which, in consequence of the husband's treatment of the wife, the Ecclesiastical Court would have decreed a separation; and that the facts are such as would have enabled the wife to pledge the husband's credit for necessities supplied to her. But is he, under this Act, guilty of refusing to maintain her? An Act(a) has been passed, of which we may take judicial notice, by which in future, where such treatment shall be shown, a judicial separation may be decreed, and provision made for a pecuniary allowance by the husband to the wife, which may be enforced. But that Act has not yet come into operation. As yet, therefore, there is no such thing as a judicial separation; and therefore, when this case was before the magistrates, all the liabilities created by the *mar- [*456] riage tie subsisted in full force. But the magistrates appear to have supposed that, because the wife might have reasonable ground for not going home to her husband, he was guilty of refusing to maintain

(a) 20 & 21 Vict. c. 85. See sect. 16, &c.

her. Can he be said to have wilfully refused or neglected to maintain her? I think not; and I am of opinion that no past cruelty could justify the magistrates in coming to such a conclusion.

COLERIDGE, J.—I am of the same opinion. The magistrates here, under stat. 5 G. 4, c. 83, s. 3, have convicted the appellant as an idle and disorderly person on the ground that he wilfully refused and neglected to maintain his wife: and they submit to us the question whether the conviction is valid in law. Take it to be the fact that the appellant has misused his wife, and that there is reasonable ground for her refusing to live with him, and that he, having promised to make payments for her, has failed to perform his promise: that I think is putting the case as strongly as it can be put: still I think there is no refusal or neglect to maintain. It appears that the promise was substituted for her living with him; but that, afterwards, he offered that she should live with him. The magistrates seem to think that, under these circumstances, they have authority to compel the performance of the promise: but that they clearly have not; and his failure to perform it is not a refusal to maintain.

WIGHTMAN, J.—This is clearly an attempt to enforce a separate maintenance in a case where the husband does not refuse to maintain the wife, but is always ready to receive her. The magistrates consider *457] that the wife, *on account of the apprehended ill usage, is not bound to go and live with the husband: but that is very different from a refusal by him to maintain her.

(ERLE, J., was absent.)

Conviction quashed.

JAMES RANDLE v. THOMAS WELL GOULD and ELLEN GOULD, his wife, Executrix of JOHN LAWRENCE, deceased.
Nov. 12.

By deed between defendant of the first part, his wife of the second, and plaintiff of the third, it was recited that differences had arisen, and were likely to continue, between defendant and his wife, and they had agreed to live apart during the remainder of their lives, subject to the proviso after mentioned; and defendant covenanted with plaintiff to allow the wife to live separate, and go where she thought fit, &c., free from his restraint, and that he would not disturb her, or sue her in the Ecclesiastical Court, or otherwise, or claim the goods which she then had or might purchase; and that, as and by way of a provision for her, he would pay to plaintiff or to her, during her life, 10s. weekly: and plaintiff, in consideration of the provision so made, and the other promises, covenanted that the wife, during the separation, would not molest defendant, or sue for conjugal rights to compel him to cohabit, or for further allowance by way of alimony; and that plaintiff would keep defendant indemnified for debts contracted by the wife during the separation: provided that, in case defendant and his wife should by writing under their hands agree to cohabit, and should cohabit for one month next thereafter, the indenture should be void.

Plaintiff declared against defendant on this deed, averring that defendant and his wife did not by such writing, or otherwise, agree to cohabit, nor cohabit for one month after, or at all; that the wife was alive; that defendant made default in the weekly payments.

Plea, upon equitable grounds, that, before the accruing of the causes of action, defendant and his wife were reconciled and cohabited together, and continued to do so, to wit, for six months thereafter.

Issue having been taken on this plea, and a verdict found for defendant, judgment was arrested:

(1) Because the reconciliation without agreement in writing did not impliedly avoid a deed framed with such an express proviso;

(2) Because, without the proviso, the reconciliation would not have avoided the deed, which would have been in the nature of an absolute post-nuptial settlement for the wife's life, holding out no inducement to live separate.

THIS declaration alleged that by indenture, made 23d May, 1855, between John Lawrence (the testator) of the first part, Mary Lawrence, his wife, of the second part, and plaintiff of the third part, reciting that various unhappy differences had arisen and were likely to continue between the said John Lawrence and Mary his *wife, and that they had mutually agreed to live apart from each other during [458 the remainder of their lives, subject to the proviso thereafter mentioned; and further reciting that the said J. Lawrence had agreed to make such provision for his said wife as thereafter and hereinafter mentioned: he, the said J. Lawrence, in pursuance of the said agreement, did thereby, for himself, his heirs, executors, and administrators, covenant with the plaintiff in manner following (that is to say), that she, the said M. Lawrence, should and lawfully might, from thenceforth and at all times thereafter, during the joint lives of them the said J. Lawrence and M. Lawrence, live separately and apart from him the said J. Lawrence, and go, reside, and be at such place or places, and with such family and families, relations, friends, and others, and follow or carry on such trade, business, or employment, as she, the said M. Lawrence, notwithstanding her coverture, should, at any time and from time to time, think fit; and that wholly freed and discharged of and from all power, authority, government, and restraint whatsoever of him the said J. Lawrence, in like manner in all respects as if she were sole and unmarried; and that he, the said J. Lawrence, should not nor would, at any time or times thereafter, sue, molest, or disturb the said M. Lawrence, or any other person or persons whomsoever with whom she might live, either in the Ecclesiastical Court or otherwise, by reason of her living apart from him; and moreover that he, the said J. Lawrence, his executors, administrators, or assigns, would not at any time claim or demand any of the jewels, moneys, clothes, linen, wearing apparel, or other goods, property, or effects whatsoever, which she, the said M. Lawrence, then had, or at any time *during such separation [459 should or might purchase or by any other means acquire; but that she should and might at all times peaceably enjoy the same to and for her own sole and separate use, and also that she might, and she was thereby authorized and empowered, from time to time, freely and absolutely to dispose of the same at her free will and pleasure, either in her lifetime or by her will, as if she were sole and unmarried: and, further, that, as and by way of a provision for his said wife, he, the said J. Lawrence, his executors or administrators, would pay or cause to be paid to the plaintiff, or to the said M. Lawrence, or one of them, during the term of her natural life, the sum of ten shillings weekly on the Saturday of each week, clear of all deductions: and, in consideration of the provision thereby made for the said M. Lawrence, and other the premises aforesaid, the plaintiff did thereby covenant with the said J. Lawrence, his executors and administrators, that she, the said M. Lawrence, would not at any time thereafter, during the separation between them the said J. Lawrence and M. his wife, in any manner molest or visit the said J. Lawrence at his place of abode or elsewhere, without his consent or approbation, nor institute any proceedings in any Spiritual, Ecclesiastical,

tical, or other Court against him, the said J. Lawrence, for conjugal rights, to compel him to cohabit or live again with her the said M. Lawrence, nor commence any suit or action against him, the said J. Lawrence, for any further allowance by way of alimony than was thereby secured or provided for her as aforesaid; and that he, the plaintiff, his heirs, executors, and administrators, would at all times thereafter save harmless and keep indemnified the said J. Lawrence, his heirs, executors, and administrators, and his and their lands, *tenements, *460] goods, and chattels, from all costs, damages, and expenses whatsoever, which the said J. Lawrence, his heirs, executors, or administrators, might be liable to pay on account of any debt or debts which at any time thereafter might be contracted or incurred by the said M. Lawrence during such separation as aforesaid, or for or on account of any board, lodging, goods, wares, apparel, or other matter or thing whatever which should or might at any time, during the joint lives and separation of them the said J. Lawrence and M. his wife, be found or provided by or on the part of her the said M. Lawrence: provided always, and it was thereby declared and agreed, that, in case the said J. Lawrence and M. his wife should, at any time thereafter, voluntarily and mutually consent and agree, in or by any writing or writings under both their hands subscribed and attested by and in the presence of two or more credible witnesses, to live and cohabit, and should accordingly cohabit and live together as man and wife for the space of or period of one calendar month next thereafter, then and in that case the said indenture, and every matter and thing therein contained, should from thenceforth cease and be void, and of no effect, anything thereinbefore contained to the contrary thereof in anywise notwithstanding: and the same, and every counterpart thereof (if any), should be forthwith cancelled and destroyed. Averment that the said J. Lawrence and Mary his wife did not, at any time after the making of the said indenture, voluntarily or mutually consent or agree in or by or under any such writing or writings as aforesaid, or otherwise howsoever, to live and cohabit, nor did they cohabit and live together as man and wife for the space of one calendar month next thereafter, nor for any space of time *461] whatever, nor *at all; and the said M. Lawrence is still living; and the said indenture, from the time of making the same until and at the time of the death of the said J. Lawrence, remained and continued, and still is, in full force and effect. And, although all things were done, &c. (general averment of performance), yet the said J. Lawrence in his lifetime, and the said defendant Ellen as his executrix since his death, made default in payment of the said sum of ten shillings weekly, according to the said covenant, for and in respect of divers (to wit), sixty-one weeks which elapsed in the lifetime of the said J. Lawrence; and the said several last-mentioned sums are still unpaid. And the said Ellen, as executrix, &c. (similar default by her for eleven weeks since the death of J. Lawrence).

Plea 3, to two sums of 8*l.* each, making together 6*l.*, parcel, &c., by way of defence upon equitable grounds: That, after the accruing of the alleged causes of action to which this plea is pleaded, and while the same were existing and unenforced by the plaintiff, the said J. Lawrence and the said Mary his wife, to wit, on the 26th day of January, 1856, became and were reconciled, and then lived and cohabited together, and

continued so to do, to wit, for the space of six months thereafter; and that there is not any liability, damage, cost, or expense arising or accruing, or which has arisen or accrued, and still remains unsatisfied, or which can arise and accrue, to the plaintiff by reason of the covenant in the said indenture contained on the part of the plaintiff to save harmless and keep indemnified the said J. Lawrence, his heirs, executors, and administrators, and his and their lands, tenements, goods, and chattels, as therein and in the said declaration in that behalf mentioned, or otherwise, by reason of the non-payment of the said sum of 6*l.*, [*462 *parcel, &c.: but that the plaintiff sues on behalf and for the benefit of, and as a trustee for, the said M. Lawrence only, and in no respect for his own reimbursement or advantage.

Plea 4, to the residue, by way of defence upon equitable grounds: That, before the accruing of any of the said causes of action, the said J. Lawrence and the said Mary his wife, in the said declaration mentioned; to wit, on the 26th day of January, 1856, became and were reconciled, and then lived and cohabited together; and that they continued so to do, to wit, for the space of six months thereafter.

Issues on these pleas.

On the trial, before Wightman, J., at the Middlesex Sittings in last Term, a verdict for the defendants was found on both these pleas. In the same Term (the plaintiff being entitled to judgment so far as regards the rest of the record), *Atherton* obtained a rule for judgment for the plaintiff notwithstanding the verdict on these pleas.

Knowles and *Wills* now showed cause. (a)—This is a case in which a Court of equity, after the husband and wife had become reconciled, would have restrained an action on the deed. The question is, on the third plea, first, how far does a condonation do away with the effect of articles of separation; secondly, how far the application of the general rule is in this instance qualified by the circumstance that the reconciliation took place after the accruing of the causes of action pleaded to in the third plea. The general rule itself will probably not be [*463 *disputed. The doctrine is “that a deed of separation, supposing it to be good at law or in equity, shall be rendered void by any future reconciliation;” per Lord Eldon, C., in *The Earl of Westmeath v. The Countess of Westmeath*, Jacob 126, 140, *Bateman v. Countess of Ross*, 1 Dow 235, *Fletcher v. Fletcher*, 2 Cox, Ca. Eq. 99, 105, Lord St. John v. Lady St. John, 11 Ves. 525, 537, *Westmeath v. Salisbury*, 5 Bligh, N. S. 339. (b) In the last-mentioned case, the deed of 1818, which was held to be nullified by the subsequent condonation, gave a life interest to the wife; in the deed in the present case there is given a life interest to the wife; but the deed contemplates the possible determination of this interest by the parties coming together in the way there described. The deed therefore gives no absolute interest, and is not like an ordinary post-nuptial settlement. Now the coming together which is contemplated in the deed is a cohabiting by consent in writing for one month: if that took place, then by the express terms of the deed the deed was to become void. This is no more than the law would have done, without express provision, but less: so far as it concurs with the law it is inoperative; “*clausula vel dispositio inutilis* are said, when

(a) Before Lord Campbell, C. J., Coleridge and Wightman, Js.

(b) S. C. as *Marquis Westmeath v. Marchioness Westmeath*, 1 Dow. & C. 519.

the act or the words do work or express no more than the law by intendment would have supplied; and therefore the doubling or iterating of that and no more, which the conceit of the law doth in a sort prevent or preoccupate, is reputed negation;" Bac. Max. Reg. 21, p. 92 (ed. 1737); and it was not competent to the parties to limit the application *464] of the general rule of law, that any condonation *puts an end to such a deed. That rule is founded on public policy, which has been, it is thought, more encroached upon already, by the decisions upon separation deeds, than is desirable, though such deeds themselves must now be allowed not to be necessarily illegal: *Jee v. Thurlow*, 2 B. & C. 547 (E. C. L. R. vol. 9). Such is no doubt the doctrine of Courts of law: these pleas are equitable. [Lord CAMPBELL, C. J.—Surely on this point there can be no distinction between law and equity. COLE-RIDGE, J.—If the parties had come together in *Jee v. Thurlow*, the doctrine would have applied.] *Wilson v. Mushett*, 3 B. & Ad. 743 (E. C. L. R. vol. 23), may be cited as an authority for the plaintiff. There it was held that a separation deed, providing for the payment of an annuity to the wife, and also that, if she and the husband should agree to cohabit again, such cohabitation should not alter the trusts of the deed, but it should remain valid, might be enforced notwithstanding a subsequent cohabitation in fact. In that case, it is true, the above authorities, except *Westmeath v. Salisbury*, 5 Bligh, N. S. 339, (a) were referred to. The Court seems to have considered that the deed might be looked upon as an ordinary post-nuptial settlement, as making a provision for the wife under all circumstances; here the proviso in the event of the parties agreeing in writing to cohabit puts an end to such a construction. In the late case of *Webster v. Webster* (b) the general principle for which the defendant here contends was allowed, though the deed, under *465] the particular circumstances of the case, did not fall within *it. *Gawden v. Draper*, 2 Vent. 217, may be cited for the plaintiff. But that was merely a question as to pleading one covenant in bar of an action on another: that is inapplicable to these equitable pleas. This explanation is given in *Lord Rodney v. Chambers*, 2 East 283, 294, a case which, so far as it sanctions an agreement with a view to future separation, is practically overruled, especially in *Durant v. Titley*, 7 Price 577; *Roper's Treatise of the Law of Property arising from the relation of Husband and Wife*, vol. 2, p. 280 (2d ed.). *Lord Rodney v. Chambers* is further explained, on grounds inapplicable here, in *Chambers v. Caulfield*, 6 East 244, 252, 3. It will be said that here the third plea sets up a defence arising only after the accruing of the causes of action. The plaintiff sues only as trustee for the wife; and she, after the reconciliation, could claim no payment from the trustee. The objection does not apply to the fourth plea.

Atherton and Field, contra.—There can be no doubt that the meaning of the parties to this deed was that it should enure to the benefit of the wife unless put an end to in the one way specified, that is, by a written agreement to cohabit followed by actual cohabitation. So that the only question is, whether the law allowed them to effectuate their intention. As to the policy of the law on this point, the doctrine of the common

(a) S. C. as *Marquis Westmeath v. Marchioness Westmeath*, 1 Dow. & C. 519.

(b) Before *Stuart, V. C.*, 1 Sm. & G. 439; and before *Lords Justices Knight Bruce and Turner*, 4 De G. M. & G. 437.

law is the same with the doctrine of equity: *Marquis of Westmeath v. Marchioness of Westmeath*, 1 Dow. & C. 519, 544; (a) *The Earl of Westmeath v. The Countess of Westmeath*, Jacob 126, 142. The most *important authority on the general doctrine appears to be *Marquis of Westmeath v. Marchioness of Westmeath*, which was in [*466 fact referred to in *Wilson v. Mushett*, 3 B. & Ad. 743; (b) and, from the reference which Parke, J., there makes to *Hindley v. Westmeath*, 6 B. & C. 200 (E. C. L. R. vol. 13), it appears that the marginal notes to *Marquis of Westmeath v. Marchioness of Westmeath* lay down the doctrine, that a reconciliation puts an end to the deed, more strongly than the case itself warrants. It is incumbent on a party seeking to avoid his deed on the ground of public policy to make out a clear case: but the authorities do not show, nor would it be a reasonable rule, that husband and wife cannot stipulate, on the occasion of a separation, for a provision which shall be secured to the wife for life, whether they are afterwards reconciled or not. [Lord CAMPBELL, C. J.—Does not such a stipulation amount to a provision for future separation? WIGHTMAN, J.—You will say that it creates no inducement to separate.] That is obviously so. [Lord CAMPBELL, C. J.—You would treat it as pin-money given after marriage.] It is so practically: and in such a gift there is nothing contrary to public policy, though it may, under certain circumstances, be avoided. It may, however, so far as the present question is concerned, be admitted that a separation deed, containing simply a covenant to pay the trustee, would be avoided by a reconciliation; for there it may be said that an intention must be implied that the payments should be made only so long as the parties continued separate: but here no such intention can be implied, the parties having expressed their intention as *to the circumstances under which [*467 the payment is to cease. That there is no rule of law or equity [*467 avoiding such a deed appears from *Gawden v. Draper*, 2 Vent. 217, *Wilson v. Mushett*, 3 B. & Ad. 743 (E. C. L. R. vol. 23), and *Webster v. Webster*. (c) It is argued, on the other side, that *Gawden v. Draper* was a decision only on a pleading point: but in *Lord Rodney v. Chambers*, 2 East 283, 295, Grose, J., says: “The case of *Gawden v. Draper* was a decision in a Court of law, which establishes the general proposition for which it was cited; for unless the agreement there declared on were valid, the plaintiff could not have had judgment.” A deed like the present might have as much effect in producing a reconciliation as in preventing one; the wife might consider that, unless she made a written agreement, she would not, by returning to her husband, lose the provision given to her by the deed. What argument as to public policy arises on this deed which might not have been urged in *Wilson v. Mushett*? There it was expressly stipulated that no cohabitation (without allowance for the case of a written agreement) should affect the deed. In *Webster v. Webster*, (c) the husband had agreed that the annuity should continue in the event of reconciliation. *Cur. adv. vult.*

Lord CAMPBELL, C. J., in this Term (25th November), delivered the judgment of the Court.

(a) S. C. as *Westmeath v. Salisbury*, 5 Bligh, N. S. 339, 399.

(b) See page 749.

(c) Before Stuart, V. C., 1 Sm. & G. 489; and before Lords Justices Knight Bruce and Turner, 4 De G. M. & G. 437.

We are of opinion that the plaintiff is entitled to our judgment. The deed of separation on which the action *is brought must now be
 *468] considered as clearly valid in point of law. By that deed the husband covenanted "that, as and by way of a provision for his said wife, he, the said J. Lawrence, his executors or administrators, would pay or cause to be paid to the plaintiff, or to the said Mary Lawrence, or one of them, *during the term of her natural life*, the sum of ten shillings weekly on the Saturday of each week." Then followed a proviso that, in case the husband and wife should at any time thereafter voluntarily and mutually consent and agree, by any writing under both their hands, subscribed and attested by and in the presence of two or more credible witnesses, to live and cohabit, and should accordingly live and cohabit, together as man and wife, for the space of one calendar month next thereafter, the said deed should from thenceforth be void.

The equitable defence, relied upon to this action for arrears of the weekly allowance, is that, before these arrears accrued, the husband and wife, without any writing under their hands, for a short time cohabited together.

This cohabitation clearly does not avoid the deed under the express proviso. The question then arises, whether a deed so framed is impliedly avoided by such cohabitation. The express proviso intimates the intention of the parties to have been that the deed should remain in force notwithstanding cohabitation, unless the cohabitation was according to the stipulated formalities and for the stipulated period of time, the wife being left at liberty, without endangering the provision intended for her, to make an experiment whether she could with safety and comfort cohabit with her husband. But, if there had been no express proviso
 *469] for avoiding the deed *in a certain manner, we are of opinion that, looking to the whole scope of this deed, the covenant to pay the weekly allowance would not have been avoided by the reconciliation and cohabitation of the husband and wife. It is not merely an allowance to her while she lives separate from her husband: it was absolutely to be paid to her by way of a provision during the term of her natural life, not being suspended or reviving as she should live with him or leave him. It is therefore a post-nuptial settlement upon her by her husband, holding out no temptation to her to separate from him: and it is as little liable to exception as a covenant to pay pin-money in a regular marriage settlement. *Jee v. Thurlow*, 2 B. & C. 547 (E. C. L. R. vol. 9), *Wilson v. Mushett*, 3 B. & Ad. 743, and *Webster v. Webster*,^(a) are express authorities in support of the view we have taken of this case.

Rule absolute.

(a) Before Stuart, V. C., 1 Sm. & G. 439; and before Lords Justices Knight Bruce and Turner, 4 De G. M. & G. 437.

THE QUEEN v. JAY. Nov. 11.

Buildings erected by the Commissioners of Lieutenancy of the City of London, under stat. 1 G. 4, c. 100, s. 39, and stat. 17 & 18 Vict. c. 105, s. 2, for the custody of the arms and stores of the militia, are within the exemption in sect. 6 of The Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), as "employed for Her Majesty's use or service;" and it is not necessary to give notice to the district surveyor before commencing the building, under sect. 38.

THIS was an appeal, pursuant to sect. 106 of The Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), against a conviction by Louis Charles Tennyson *D'Eyncourt, Esquire, one of the magistrates of the Police Courts of the Metropolis, sitting at Worship [*470 Street; whereby he convicted the appellant in the sum of one shilling and costs, for not having given, pursuant to the 38th section of the said Act, to the district surveyor two days' notice before commencing the building hereinafter mentioned.

The question is, Whether such building is one of the buildings exempted from the operation of the said Act, part 1, by sect. 6, as a building "employed for Her Majesty's use or service."

The said building, which is in course of erection by the above-named John Jay, under a contract with Her Majesty's Commissioners of Lieutenancy for the City of London, is built by the said Commissioners under the powers and directions, and for the purposes, of the statutes hereinafter mentioned, as a militia depôt and head quarters for the Royal London Militia, and for the depositing and safe custody therein of the arms, accoutrements, clothing, and stores of the Royal London Militia.

The said Commissioners of Lieutenancy are appointed by letters patent under the Great Seal, bearing date 1st December, 1853, pursuant to the stat. 13 & 14 C. 2, c. 3, "For ordering the forces in the several counties of this Kingdom."

By sect. 2 of stat. 1 G. 4, c. 100, "For amending and reducing into one Act" two Acts named, "for the better ordering and further regulating of the militia of the city of London," it is enacted, "that His Majesty's Commissioners of Lieutenancy that now are and hereafter shall be constituted and appointed for the City of London, shall have full power and authority, and are hereby *required, to call [*471 together, arm, array, and cause to be trained and exercised, the militia of the said City, once in every year, and at such other times, and in such manner as hereinafter directed; and the said Commissioners shall from time to time constitute and appoint" officers "to train, discipline, and command the persons so to be armed and arrayed;" "and the officers so appointed shall have the same rank in the army as the officers of the rest of the militia forces of this Kingdom."

By sect. 39 of the said Act, after reciting that "it is necessary that the said militia should be provided with an head quarters and other proper accommodations and conveniences for their assembling and mounting guard when embodied, and for the depositing and safe custody of the arms, accoutrements, clothing, and stores of the said militia when disembodied, and for their assembling for their annual exercise and for other military purposes;" it is enacted "that it shall and may be lawful for His Majesty's said Commissioners of Lieutenancy for the City of London, and they are hereby authorized and empowered to pay,

expend, and apply so much of the trophy tax to be hereafter raised in and for the City of London, under and by virtue of the said Acts passed in the 13th and 14th years of King Charles 2d, and of this Act, as may be necessary and expedient, in, for, and towards the providing and building of an head quarters and other necessary accommodations and conveniences for the several purposes aforesaid, and in the necessary expenses attendant thereon, and in keeping the same in repair; and all payments to be made by the said Commissioners for the several purposes aforesaid by virtue of this Act, shall from time to time be allowed in their accounts of the expenditure of the trophy money raised *472] in the said City; and the justices of the peace acting for the said City, in examining and allowing the said accounts, pursuant to the directions contained in this Act, are hereby directed and required to allow the same accordingly."

Sect. 30 enacts "that for the several purposes aforesaid, His Majesty's said Commissioners of Lieutenancy for the said City are hereby authorized and empowered from time to time to accept and take, in the name of their treasurer for the time being, and his successors, any grant, demise, lease, or agreement of ground and premises whereon to erect and build such head quarters as aforesaid, and to charge and make liable the said trophy tax with the payment of such rent, fine, or acknowledgment as may be by them deemed a proper rent or compensation for such land and premises, and to authorize and empower such treasurer, on their behalf, to enter into proper covenants and agreements for the purposes aforesaid, and to execute a counterpart or counterparts of any such grant, demise, lease, or agreement, and such treasurer shall be indemnified and saved harmless by the said Commissioners by virtue of this Act."

Sect. 45 enacts "that the said Commissioners shall and are hereby required and empowered to hold Courts of Lieutenancy for the said City from time to time, as often as they shall think expedient, and to issue such precepts at the said Courts, and to make such orders as shall be requisite and necessary for the purpose of carrying this Act into execution."

By stat. 17 & 18 Vict. c. 105, s. 2, it is enacted that, "in all cases where any place provided for the purpose of keeping therein the arms, *473] accoutrements, clothing, and other stores belonging to any regiment, battalion, or corps of militia when not embodied, is or may become from any cause insecure, insufficient, or unfit for the safe custody of such arms, accoutrements, clothing, or other stores, or in case the public service or convenience require the site of the same to be changed, or in case no such place has been provided, the justices of the peace for such county at their general or quarter sessions next ensuing assembled, upon the representation of the Lord Lieutenant of such county, and of the colonel or commandant of such regiment, battalion, or corps, that no such place has been provided, or that the place provided is insecure, insufficient, or unfit, being duly satisfied thereof, may and they are hereby required to provide a secure and suitable place for that purpose, and to that end they may in their discretion from time to time resolve either to purchase or hire any suitable buildings or premises, and if necessary, to enlarge, alter, or improve the same, or from time to time to enlarge, alter, or improve any buildings or premises already purchased

or hired, or to purchase or take on lease for any term not less than sixty years any portion of land for the purpose of building and to build or rebuild thereupon secure and suitable buildings and premises for the purpose aforesaid;" and, after incorporating The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, and making other provisions, the section proceeds: "And no place provided for the keeping of militia stores under this or the recited Acts, nor any buildings or premises appurtenant thereto, shall be liable to be assessed to any county, borough, parochial, or other local rates or assessments."

*Sect. 5 empowers the justices to mortgage the county-rates to provide for the expenses of such buildings. [*474]

Sect. 10 enacts that "all and every the powers, authorities, and directions in and by this Act given to or vested in the Lords Lieutenant, Deputy Lieutenants, and treasurers of counties, and the justices of the peace in their general or quarter sessions assembled, shall extend to and include the Commissioners of Lieutenancy for the City of London and their treasurer for the time being, so far as the same may be applicable to the militia of the said City."

Stat. 18 & 19 Vict. c. cxlv.,(a) after reciting that doubts existed whether the trophy-tax could be deemed a county-rate under the meaning of the last-mentioned Act, and also reciting that "the place provided for the purpose of keeping therein the arms, accoutrements, clothing, and other stores belonging to the Royal London Militia has become insecure and insufficient, and that the public service requires the site of the same to be changed, and that more convenient and requisite headquarters and store-houses should be constructed, and other proper accommodation should be secured and provided for the assembling, training, and mounting guard of the said Royal London Militia, and it is expedient to vest in the said Commissioners further powers for the purchase and use of lands for the said several purposes; but the same cannot be effected without the authority of Parliament," enacts:(b) "that the said trophy-tax shall, for the purposes of the said recited Act of the 17th and 18th years of Her present Majesty, be deemed and taken to be a county-rate," and gives power to the said Commissioners to mortgage the *trophy-tax, to take the lands mentioned in the Schedule, and [*475] power to the Bishop of Carlisle and the Ecclesiastical Commissioners for England to grant to the said Commissioners of Lieutenancy a lease of certain ground then partly used for exercising the said London Militia.

The trophy-tax is raised by warrant under the sign manual of the Queen, pursuant to Act of 13 & 14 C. 2, c. 3, s. 27, and 1 G. 4, c. 100, s. 35, by an equal pound-rate upon all lands and tenements, hereditaments, and real and personal estate, within the city of London.

The building in question is being erected by the said John Jay, the appellant, under a contract for that purpose made between him and the said Commissioners of Lieutenancy, according to plans and specifications prepared by Mr. Jennings, their architect and surveyor: and the building thereof is under the exclusive supervision and control of the said Commissioners and their said architect and surveyor, who is

employed and paid by the said Commissioners for that purpose. And there has been no interference with the said building on the part of the authorities at the Horse Guards or any Government surveyor. The said building, when completed, will be the property of the said Commissioners and under their control. The arms, ammunition, and clothing and accoutrements, for the Royal London Militia, are provided by and at the expense of the Government, as well as the principal barrack furniture, the hospital stores, beds for the hospital, &c., and are property of the Crown. The Royal London Militia are raised and paid at the expense of the Government, the same as the other militia forces of the kingdom.

No notice, under sect. 38 of The Metropolitan Building Act, 1855, *476] was given by the said John Jay to the *district surveyor before commencing the said building: and he was, in consequence of his default, convicted under sect. 41 of the said Act.

Against this conviction the present appeal is brought by the said John Jay.

The question for the opinion of the Court is, Whether the said building is within the exemption specified in sect. 6 of The Metropolitan Building Act, 1855.

If the Court shall be of opinion that the said building is within the said exemption, the said conviction is to be quashed. If the Court shall be of opinion that it is not within the said exemption, the said conviction is to be affirmed.

Montague Smith, in support of the conviction.—The building cannot be said to be “employed for Her Majesty’s use or service.” It is not indeed employed at all, not being completed. But, even when completed, it will not fall within the exemption; for it will not be employed directly for the Crown, but for the Commissioners. They provide the places and buildings for the custody of the stores, &c., under their statutory duty; and they may vary the custody as they please, without the power of interference on the part of the Crown. The word “employed” cannot be taken in the literal sense: if it could, a house might be improperly built, without the superintendence of the district surveyor, and then be left standing, upon the Commissioners hiring another building for their purpose.

Lush, *contra*, was not called upon.

Lord CAMPBELL, C. J.—This case is perfectly clear. *The *477] building is employed for Her Majesty; for it is to be applied to the custody of the arms, &c., of her troops. For what other purpose can it be said to be employed? The object is that it may serve for the deposit of military stores, and for securing the arms.

COLERIDGE, J.—I am quite of the same opinion. The exemption applies to all buildings employed in Her Majesty’s service. *Mr. Smith* contends that this building is not so employed, because it does not yet exist in a complete state. But it is intended for Her Majesty’s use. Buildings in the possession of the Crown, such as the Royal Palaces, are exempted; and then, to prevent doubt, larger words are added. If the building were used for the custody of the arms of regular troops there could be no doubt: and what difference can it make that the troops here are militia?

WIGHTMAN, J.—For what other use is the building? Common gaols are exempted also.

(ERLE, J. was absent.)

Conviction quashed.(a)

(a) See *Regina v. Fuller*, *antè*, p. 365, note (a).

*CHARLES BROOK the Younger and JOSEPH HIRST v. WILLIAM HENRY ASTON. Nov. 16. [*478]

A patent was taken out in 1853 for, amongst other things, improving the texture of the threads of cotton and linen yarns, by exposing the threads in a distended state to the action of beaters, the effect of which was to polish the sides of the threads and produce smoothness and a glacé effect. In 1856 the plaintiffs took out a patent for, amongst other things, an improvement in the finishing yarns of wool or hair, by exposing their threads in a distended state to the action of machinery, which, it was admitted, was substantially the same as the machinery described in the patent of 1853. The claim in the plaintiffs' specification was, amongst other things, to the invention of "causing yarns of wool or hair whilst distended and kept separate to be subjected to the action of rotatory beaters or burnishers, whereby the fibre is closed and strengthened, and the surface effectually polished." On the trial of an action for the infringement of the plaintiffs' patent, it was proved that the process of the patentees of 1853 had not previously been applied to wool or hair; and evidence was given that the effect upon wool was not the same as upon linen.

Held, by this Court, that the plaintiffs' specification claimed what was merely the application of the old machinery in the old manner to an analogous subject, and was not the subject-matter for which a patent could be claimed, and, consequently, that the plaintiffs' patent was wholly void. Aliter if the claim had shown any novelty or invention in the mode of applying the old machinery to the new purpose.

ACTION for infringing a patent. Pleas: 1. Not guilty. 2. That plaintiffs were not the first and true inventors. 3. That the alleged invention was not a new invention. 4. That the alleged invention was not the working or making of any manufacture for which letters patent could by law be granted. 5. A denial of there being any specification. Issues thereon.

On the trial, before Lord Campbell, C. J., at the Middlesex Sittings after Trinity Term 1857, the letters patent granted to the plaintiffs, dated 23d February, 1856, for "An improvement in finishing yarns, of wool or hair, and in the finishing of woven fabrics or piece goods," were proved, and also their specification, dated 23d February, 1856. The defendant's counsel put in evidence letters patent, dated 25th November, 1853, granted to William Leigh Brook and Charles Brook, for "Certain improvements in preparing, dressing, finishing, and winding cotton and linen yarns or threads, and in the *machinery or apparatus connected therewith," and the specification of that patent, dated 25th May, 1854. [*479]

The points discussed in *banc* turned entirely on the description of the inventions in the two specifications. The specification of William Leigh Brook and Charles Brook, dated 25th May, 1854, commenced: "Our improvements relate, first, to a method of dressing and finishing cotton and linen yarns or threads by the application of friction, produced by a peculiar combination of horizontal brushes with revolving beaters or burnishers, by which means a more perfect adhesion of fibre with smoothness and glacé effect is produced; the yarns or threads being extended

from end to end of the machine, and, in contradistinction to being dressed and finished in the hank or skein, each thread being kept separate, so that every portion of the surface of the thread becomes exposed to the combined operation of the said horizontal brushes and rapidly revolving beaters or burnishers. The yarn or threads to be dressed are wound upon a roller or beam at one end of the machine, pass through the operation of sizing as in common use, and from thence to the corresponding beam at the opposite or finishing end of the machine; between the roller beam and the opposite beam are fixed three or more spindles or shafts carrying the revolving beaters or burnishers, and are so arranged that the arms of the said beaters may beat in either direction, or be made separately to beat opposite to one another on the upper and under surfaces of the yarns or threads. The said arms may be covered with zinc or other metal, wood or cloth. In combination with these said beaters horizontal brushes are attached (worked by cranks or other suitable means), acting upon the surfaces of the yarns and threads at the *480] *sides in one direction, and thus effectively laying the fibre."

This specification then described another improvement in machinery for winding thread, distinct from the first invention and not material to the present case. It then, by the aid of drawings, described machinery by which the objects of the first invention might be effectuated. The claim as to the first invention was as follows: "Having now fully and particularly described our invention, we wish it distinctly to be understood that we claim, first, the dressing and finishing of yarns and threads by the peculiar construction and arrangement of the machinery and apparatus, as substantially herein set forth, and shown in the accompanying drawings, and the dressing or finishing such threads or yarns, the whole passing from one roller and travelling throughout the length of the machine in perfect isolation as regards each thread to the winding on rollers or finishing beam, whereby the smoothness and glacé effect is obtained, in contradistinction to being dressed and finished in the skein or hank."

The plaintiffs' specification commenced the description of their invention thus: "This invention has for its object an improvement in finishing yarns of *wool or hair*, and in the finishing of woven fabrics or piece goods, and consists of causing yarns of wool or hair whilst distended and kept separate to be subjected to the action of rotatory beaters or burnishers, by which such yarns will be burnished and polished on all sides. And the invention also consists of subjecting woven fabrics, or piece goods of cotton, linen, silk, wool, hair, or other fibre, when in an extended state, to the action of rotatory beaters or burnishers on either or both sides, *481] *by which such woven fabrics or piece goods will be burnished or polished on their surfaces." The specification then describes, by the aid of drawings, machinery which, it was admitted by the plaintiffs' counsel at the trial, was substantially the same as that described in William Leigh Brook and Charles Brook's specification of 25th May 1854; and then proceeded: "Having thus described the nature of our invention and the manner of performing the same, we would have it understood that we make no claim to any of the parts separately, nor do we confine ourselves to the exact details described; but what we claim is: firstly, the causing yarns of wool or hair whilst distended and kept separate to be subjected to the action of rotatory beaters or burnishers, whereby the fibre is closed and strengthened, and the surface effectually

polished. Secondly, we claim the subjecting woven fabrics or piece goods of cotton, linen, silk, wool, hair, or other fibre, when in an extended state, to the action of rotatory beaters or burnishers as herein described, whereby the piece of the woven fabric or piece goods is closed and polished, and is made soft and silky to handle and touch." Evidence was given on both sides. It was proved and admitted at the trial, by the plaintiffs' counsel, that the mode of operating on woollen threads described in the plaintiffs' specification was substantially the same as that of operating on linen threads described in the specification of William Leigh Brook and Charles Brook. In showing cause in banc, the plaintiffs' counsel argued on the assumption that it was proved at the trial that the process in William Leigh Brook and Charles Brook's patent had never been applied to woollen threads, but only to cotton and linen; and that the effect produced *on woollen thread was different from that produced on cotton or linen, and was new and beneficial. The [482 defendant's counsel were not heard out in banc; so that it did not appear whether they acquiesced in this view of the evidence; but the decision in banc went on the hypothesis that such was the state of the evidence. At the trial the defendant's counsel contended that, on the admitted facts, the claim in the plaintiffs' specification of 28d February, 1856, embraced some of the same matters as those already described in the specification of 25th May, 1854, and consequently claimed what was not the subject of a patent; that the patent on which the present action was founded was void. The Lord Chief Justice reserved those points for the Court. The case proceeded, and was left to the jury. They found an infringement of that part of the patent which related to the plaintiffs' second claim; and the verdict was entered for the plaintiffs, subject to the leave reserved. In the ensuing Term *Hugh Hill* obtained a rule to show cause why the verdict should not be set aside and a verdict entered for the defendant on the second, third, and fourth issues, or a nonsuit on the grounds that the facts proved and admitted at the trial showed that the patent, for the infringement of which this action was brought, was invalid in this: "that the alleged invention was not new; nor was it a subject-matter for which a patent could by law be granted; nor were the plaintiffs the first inventors thereof: and that the facts proved and admitted showed that the alleged invention was but a new use of an old invention."

Sir *F. Thesiger*, *Bovill*, and *Hindmarsh* now showed cause.—If the plaintiffs' claim had been for the use of the old machinery, merely applying it to a different *material, no doubt he would have claimed what was not new: that was the principle of *Kay v. Marshall*, 5 New Ca. 492 (E. C. L. R. vol. 85), (a) where the claim was to monopolize for spinning macerated flax the use of the ordinary spinning machinery, with the rollers fixed at within $2\frac{1}{2}$ inches distance from each other, that being the distance that suited the short fibre of macerated flax. It appeared in fact that it was an old principle in spinning machinery to fix the rollers at such a distance as would suit the length of the fibre of the article spun, and that in spinning some substances, such as cotton, the distance was less than $2\frac{1}{2}$ inches; in spinning others,

(a) In C. B., on a case sent from the Rolls; 8 Cl. & F. 245, in Dom. Proc., affirming the judgment of the Master of the Rolls which concurred with the opinion given in C. B.

such as dry flax, it was more. It was clear that the claim of the machinery was not good; and on this ground the judgment of the Common Pleas was based. So in *Losh v. Hague*, Webster, P. C. 202, where the claim was, in effect, to monopolize the use on a railway of a kind of wheel which had been used before railways came into general use, Lord Abinger, in summing up at *Nisi Prius*, explained to the jury that this was not the subject of a patent, and used illustrations such as that when all mankind had been used to eat soup with a spoon no patent could be taken out by a man who first said you might eat peas with a spoon; or when scissors were first invented to cut cloth, no patent could be taken out for cutting silk with them; and this general direction was right; but, as is pointed out in a note to *Losh v. Hague*, Webster, P. C. 208, note (f), there are a large class of cases in which the result of a new application of an old invention is to produce a new manufacture; *484] and in such cases the patent is good. Many *of those are enumerated in the judgment in *Crane v. Price*, 4 M. & G. 580 (E. C. L. R. vol. 43): and in *Dobbs v. Penn*, 3 Exch. 427, 433,† Parke, B., recognises that principle as justifying the decision in *Crane v. Price*, the correctness of which at first he had doubted. In the present case the evidence was that the operation of the plaintiffs' process on wool thread produced a new article.

Hugh Hill (with whom were *Manisty* and *Webster*), in support of his rule.—The invention described in the specification of William Leigh Brook and Charles Brook is in effect that of arranging the threads of linen or cotton separately and distended, and exposing them to the action of machinery to beat and polish the yarns and threads at the sides, so to lay the fibre and produce a smooth and glacé effect on the yarns and threads. The plaintiffs' claim is to apply what is admitted to be substantially the same machinery to threads of wool or hair arranged separately in the same way, whereby the fibre is closed and strengthened, and the surface effectually polished. It is the same invention applied to wool and hair in the same manner as it had been to linen and cotton. If there had been any novelty in the mode of the application of this machinery to wool, it might perhaps have been the subject of a patent: but, as was said by Lord Denman, C. J., in *Regina v. Cutler*, Macr. 124, 133, a man "has no right to take out a patent for the mere application of particular things to any particular purpose. If he had made a new combination, that might have been a new discovery, and a proper subject for a patent; but I think Lord Abinger's illustration is a striking one, and applicable to the present case—'It is like *485] sweeping a *carpet of a new manufacture with an old broom.'" That is precisely the case here. (He was then stopped by the Court.)

Lord CAMPBELL, C. J.—We are all satisfied that the rule must be absolute. It seems to me that this specification claims what is not an invention for which a monopoly can be claimed. It may well be that a patent may be valid for the application of an old invention to a new purpose; but, to make it valid, there must be some novelty in the application. Here there is none at all. We may suppose that the specification of 1853, instead of extending to cotton and linen yarns, had been confined to cotton yarns only. Could, in that case, a new patent have been supported for applying the same process precisely to linen threads?

It is clear it could not. In all the cases in which a patent has been supported there has been some discovery, some invention. It has not been, as in this case, merely the application of the old machinery in the old manner to an analogous substance. That cannot be the subject of a patent; and this patent claiming it is void.

COLERIDGE, J.—I am of the same opinion. It is admitted that the mere application of old machinery is not the subject of a patent. We must therefore look here to the specification, to see what novelty is claimed. Reading the plaintiffs' claim and then reading the former specification, we find the processes the same in principle and in detail. The threads are kept separate and operated on in the same way; the only difference is, that the one is applied to cotton and linen only, and the other to wool and hair.

*WIGHTMAN, J.—That also seems to me to be the only difference between the processes. The result which, according to the [*486 specifications, is to be brought about in each case is the same, namely, that the fibre is to be made firm and polished; and it is brought about by the same process.

(ERLE, J., was absent.)

Rule absolute to enter a nonsuit.

The QUEEN v. JOHN FAIRIE, ADAM FAIRIE, and THOMAS FAIRIE. Nov. 16.

On an indictment for a nuisance in carrying on an offensive trade, a conviction of the defendant before justices for an offence against stat. 16 & 17 Vict. c. 128, s. 1, committed at the same place and in the course of the same trade, but anterior to the period comprised in the indictment, was received in evidence.

Held by the whole Court (Lord Campbell, C. J., Coleridge and Wightman, Js.), that it was improperly received, the offence of which defendant was convicted not necessarily being a nuisance.

And, by Lord Campbell, C. J., and Coleridge, J., even if it had been a conviction for an offence precisely similar to that charged against the defendant, except that it was anterior in time, it would not have been admissible. Wightman, J., not concurring.

INDICTMENT, found in February 1857, at the Central Criminal Court, against the defendants, for having, on 1st January, 1856, and on various days and times between that day and the time of finding the indictment, committed a nuisance by keeping up furnaces for making animal charcoal. Plea: Not guilty. Issue thereon. The indictment was removed into this Court by certiorari.

On the trial, before Wightman, J., at the Westminster Sittings after last Trinity Term, it appeared that the defendants used furnaces for the manufacture of animal charcoal on their premises in Whitechapel. The *controversy was, whether, in the mode in which they conducted [*487 the manufacture, it was a nuisance. A great body of evidence was called to prove that it was a nuisance. In the course of the examination and cross-examination it appeared that the manufacture had been conducted for some years before the time of the indictment in the same manner as it was afterwards. The evidence of the witnesses for the prosecution went to show that the manufacture always had been a nuisance; whilst the cross-examination went to show that no complaints

had been made. A witness was then called to prove a conviction of the defendants. The witness produced the minutes of what passed before the justices; by which it appeared that, in 1855, the defendants were convicted, under stat. 16 & 17 Vict. c. 128, s. 1, in a penalty of 3*l.* and 3*s.* costs, which the defendants paid. The conviction had not been drawn up: but, as that could be done at any time, the defendants' counsel consented to its being taken as if drawn up,^(a) and objected that the conviction was not admissible on this issue. The evidence was received. Verdict for the Crown.

Bovill, in this Term, obtained a rule *Nisi* for a new trial on the ground of the improper reception of the evidence.

Byles, Serjt., and *H. Hawkins* now showed cause.—The conviction was not *res inter alios*. The proceeding before the justice was on behalf of the Crown against the defendants, as well as the indictment. [Lord CAMPBELL, C. J.—I do not see how proof that the defendants committed an offence in 1855 is evidence that they are guilty of an offence in *488] 1856.] No: but the parol *evidence was strong that the same thing was done in 1856 that was done in 1855; and, if that was so, it was important to show that what was done in 1855 was an offence. The defendants did not appeal against the conviction: and that, even if the conviction is not evidence *per se*, is some evidence of an admission, making the conviction so far evidence: *Eaton v. Swansea Waterworks Company*, 17 Q. B. 267 (E. C. L. R. vol. 79). Evidence of the mode in which a defendant carried on the same trade in another place has been admitted at *Nisi Prius* by Coleridge, J., on an indictment for a nuisance. [COLERIDGE, J.—It was admitted by me under peculiar circumstances. The alleged nuisance was in Liverpool: and certain effects there produced were, by the prosecution, attributed to the fumes from the defendant's manufacture. The defence was, that those effects were attributable to other local causes. To meet this, I admitted evidence that the same effects were found in the neighbourhood of the defendant's similar manufacture carried on in the country, where those local causes did not exist, and that the defendant had paid compensation for them. Lord CAMPBELL, C. J.—Under such circumstances, it was clearly good evidence of the tendency of the manufacture to produce such effects.] So, here, it is evidence of the tendency of the trade carried on in this way to be a nuisance. [COLERIDGE, J.—The conviction, at most, only shows that it had a tendency to cause an offence, under stat. 16 & 17 Vict. c. 128, s. 1, which might be without any nuisance at common law. But, even if it were an indictment for a nuisance then committed, you make its admissibility depend on the trade being the same then as now. *489] How is that to be determined? On the *voir dire* by the *Judge, or is it to be left to the jury? And may the defendants, before the conviction is admitted, tender rebutting evidence to show that the trade was not the same? Lord CAMPBELL, C. J.—It would be most inconvenient to raise such a collateral issue.] In *Rex v. Neville*, 1 Peake's N. P. C. 91, on a trial of an indictment for a nuisance, it is stated that, "amongst other evidence, the prosecutor produced a bond from the defendant to the parish officers of the place where he before resided, acknowledging that the trade he carried on was a nuisance.

(a) See *Regina v. Yeoveley*, 8 A. & E. 806 (E. C. L. R. vol. 35); *Regina v. The Justices of St. Albans*, 8 A. & E. 932 (E. C. L. R. vol. 35).

and binding himself not to continue it. To lay a foundation for this evidence, the prosecutor had before proved, that the trade was carried on in the same manner at the place where he now was, as at his former residence. *Erskine*, for the defendant, objected to this evidence. What is a nuisance is a question of law mixed with fact. The defendant may have acknowledged himself guilty of a crime which the fact would not constitute, and what may be a nuisance in one place will not be so in another. Lord KENYON.—Certainly, what is a nuisance in one situation is not so in another. In places where offensive trades have been long carried on they are not nuisances, though they would be so in any of the squares, or other places where such trades have not been exercised. But the defendant having acknowledged himself guilty of a nuisance in another place, cannot object to this evidence, which will weigh more or less against him, as it shall appear this place is more or less like that where he before resided. The evidence was therefore received."

Bovill, in support of his rule, was stopped by the Court.

*Lord CAMPBELL, C. J.—I am of opinion that this conviction was not admissible. I should have great difficulty in thinking [*490 even a conviction on an indictment in precisely the same terms as the present indictment, but laying the offence at a different time, admissible. It is the boast of our administration of justice that the accused has only to answer to one charge at a time, and that on the trial for one offence the prosecutors may not give in evidence that he has been guilty of others. I think that to admit the evidence of the conviction, if it had been on an indictment, would be an encroachment on this principle. But in the present case an objection pointed out by my brother Coleridge during the argument is decisive. The offence under the Act under which the defendants were convicted is not the same as that for which they are indicted; and to prove that they were guilty of the offence in 1855 is no proof that they were even then guilty of a nuisance. *Eaton v. The Swansea Waterworks Company*, 17 Q. B. 267 (E. C. L. R. vol. 79), was an action to try the civil right to an easement. The conviction was held admissible as evidence tending to show a break in the enjoyment as of right. I think that case was rightly decided, and that, under the circumstances, the conviction was very proper evidence for that purpose; but it does not touch the present case. My brother *Byles*, however, has produced an authority that comes very near to the present, or rather goes further than he requires. Any deliberate decision by Lord Kenyon must always be treated with great deference; but I cannot assent to what he is reported to have decided in *Rex v. Neville*, 1 Peake's N. P. C. 91. It would lead to the infringement of every principle. He *says it is admissible evidence, and "will weigh more [*491 or less against him, as it shall appear this place is more or less like that where he before resided." So that on this a collateral issue is raised; and one side may produce evidence to show that the places were alike, and that the trade at his former residence was conducted in the same manner and to no greater extent, and the other side call evidence to show that the former trading differed in place and degree. This seems to me quite irreconcilable with the mode in which criminal law is administered in this country. No other authority can be produced for this doctrine, which I think unsound in principle.

COLERIDGE, J.—The issue in this case was whether the defendants,

on or after 1st January, 1856, had carried on a trade so as to be a nuisance at common law. My brother *Byles* says that, to prove this, he is entitled to show that the defendant has admitted that at some former time he carried on the trade so as to be a nuisance. Even if the evidence amounted to this, it would be very doubtful if it would be legitimate. But, whether it would or would not, is not now material; for the evidence did not amount to this. The conviction, whether appealed against or not, can never be more than evidence that the defendants committed the offence charged in it. We must look at the Act to discover what that offence is; and there we find it is not a nuisance. It may be that in carrying on the trade so as to commit that offence they committed a nuisance; but it may also be that they did not. But, if it did amount to the full admission that he then was guilty of a nuisance, *492] it is very doubtful if it would be admissible. *If you look to the mode in which a trial is conducted (and the rules of evidence are framed with reference to that), you see how objectionable it is to admit what tends to raise collateral issues; and, if this conviction were admissible on the grounds suggested, the judge and jury must collaterally try the facts on which alone it is said to be admissible; and, on principles of general justice, the party ought not to be called upon to meet a charge of having formerly committed a nuisance, which he can hardly be supposed to be prepared to disprove.

WIGHTMAN, J.—The question was whether the process of the defendants, as now carried on, was or was not a nuisance. It was not a question at all as to the intention, but the fact. The evidence carried the matter back before the time of the conviction. Many witnesses had been called; and there had been examination and cross-examination as to whether the process had or had not been a nuisance for two years past. Now, I confess that I should still greatly doubt whether, if a conviction on an indictment, precisely similar to the present indictment, for a nuisance in using the same process in the same manner during that time, had been tendered in evidence, it ought not to have been received. I doubt if it would not have been some evidence to go to the jury. But I am much struck with the objection that the conviction and the present indictment are not *ad idem*. And, without pledging myself either way as to what might be right on the other supposition, I think on this ground that the conviction should not have been received.

(ERLE, J., was absent.)

Rule absolute.

*493] *JOHN MILLER, JOHN HOUGHTON, and PETER MUIR-
HEAD MILLER, v. HENRY WOODFALL. Nov. 17.

A shipowner loaded his ship, which was bound for Liverpool, with goods on his own account; and he insured the ship and the freight of the said goods by distinct insurances. The ship was stranded at S., on the English coast, twenty miles from Liverpool. The shipowner abandoned the ship to the insurers on the ship. After the abandonment, the shipowner, at his own expense, had a part of his goods taken out and conveyed by lighters to Liverpool; and he, at his own expense, procured assistance by which the ship, with the remainder of his goods on board, was brought to Liverpool. Afterwards, the insurers accepted the abandonment. On the assured claiming for the loss of the ship from the assurer, the assurer claimed credit for the freight of the goods of the shipowner.

Held: that nothing in the nature of freight for the carriage of the shipowner's goods to S

passed to the abandonees; but that they were entitled to an allowance for the carriage of the part of the goods from S. to Liverpool in the ship after the abandonment, to be estimated at the current rate of freight as if brought from S. to Liverpool by another ship.

THIS was a special case, stated for the opinion of this Court, without pleadings, by order of Erle, J.

The facts of the case were stated to be as follows.

The ship Melbourne, of which the plaintiffs are owners, sailed from St. John, New Brunswick, on the 14th February, 1857, bound for Liverpool with a cargo of timber and deals, which was shipped on owner's account. The bills of lading were filled up without any freight being named; the reason being that the cargo was owner's property.

The plaintiffs effected policies of insurance in the ordinary form on freight, valued at 2000*l.*, to the extent of 2000*l.*; and on ship, valued at 10,000*l.*, to the extent of 10,000*l.* (A copy of one of those policies accompanied the case.) The whole insurance on freight was 2000*l.*: viz., 500 on freight, part of the accompanying policy for 2500*l.*;

ship valued at 10,000*l.*; freight at 2000*l.*;

714 in a similar policy, for 1000*l.*;

786 in a policy on freight alone, valued at 2000*l.*

2000

Thus freight, eo nomine, or an interest so designated, valued at 2000*l.*, was covered by insurance. There were *other separate policies [494 on the ship alone, making up the insurance on ship to the value of 10,000*l.* in the whole.

The defendant is an underwriter on the first-mentioned policy.

The vessel encountered a gale off the port of Liverpool; and, after cutting away her masts, was stranded off Southport, about twenty miles to the northward of the port. The assured thereupon gave notice of abandonment to the underwriters on ship; which was eventually accepted by them. There was no abandonment to the underwriters on freight: and it is not intended in this case to raise any question as to their liabilities.

Part of the cargo was discharged where the vessel lay at Southport, and brought in lighters, hired for the purpose, to Liverpool. The ship, having been so lightened, was afterwards floated off the beach, and was, with the assistance of steam tugs, brought with the remainder of the cargo to Liverpool. The whole of this was done by the plaintiffs, and at their expense, after the notice of abandonment had been given, but before it was in fact accepted. Subsequently it was accepted by the underwriters.

In adjusting the loss amongst the several parties interested, several questions have arisen between the plaintiffs and the underwriters on ship, as to whether the underwriters on ship are entitled from the plaintiffs to any, and, if any, what, allowance in the nature of freight for the whole or any part of the cargo under the circumstances above stated.

The Court is to have power to draw any inferences of fact. The parties have agreed that the loss shall be adjusted by an average adjuster at Liverpool, according to the principles to be laid down by this Court, upon which they wish to be guided by the opinion of the *Court. [495 The questions for the opinion of the Court are:

1st. Whether anything in the nature of freight for the entire voyage

from St. John to Liverpool passed to the underwriters on ship on the abandonment of the ship.

2d. If the underwriters on the ship, as abandonees of the ship, are entitled to freight, are they so entitled on the entire cargo, or only on that portion actually brought in the ship to Liverpool?

3d. If they are entitled to freight, either on the entire cargo or on part of it, on what principle is it to be calculated? Is such freight to be the difference between the cost of the cargo at St. John and the net proceeds at Liverpool, less the cost of lighterage from Southport? Or is the current rate of freight at St. John from that port to Liverpool at the time of the shipment, less the cost of lighterage?

The case was now argued.(a)

Broun, for the plaintiffs.—The first question is, whether it be a general rule that the abandonees of the ship have a claim on the owner for freight. Secondly, if that be the general rule, whether the circumstances of the present case constitute an exception from the rule. [Lord CAMPBELL, C. J.—The general right of the abandoner to the profits earned by the ship will not, I presume, be disputed.] In cases in which the owner of the ship and the owner of the cargo are distinct persons, so that there is a contract to pay freight, it is so. That was decided in *Davidson v. Case*, 2 Br. & B. 379 (E. C. L. R. vol. 6).(b) There Bayley, J., differed *from the majority of this Court, the judgment *496] of which was, however, affirmed in the Exchequer Chamber. Lord Ellenborough, in this Court, appears to have founded his judgment partly on the concurrence of opinion in Westminster Hall, and partly on the main principle that the underwriter, from the time when the ship becomes his property, has the use of it: Abbott, J., refers to Valin, *Nouveau Commentaire sur l'Ordonnance de la Marine*, liv. III. tit. 6, art. 15 (vol. 2, p. 59, ed. Rochelle, 1766), where the freight is treated as an incident attached to, and following, the ship. Holroyd, J., lays it down that the abandoner “stands in all respects as to future benefit in place of the owner.” What passes, in such a case, is the right which the shipowner had previously acquired by contract. But, where the owner of the ship and the owner of the cargo is the same person, there can be no such contract, and there is nothing to pass. Freight, though said to be incident to the ship, is still merely the result of personal contract, express or implied; and such a contract cannot run with the ship: the word “incident” is therefore not to be understood exactly in its full ordinary sense. In *Stewart v. Greenock Marine Insurance Company*, 2 H. L. Ca. 159, the owners of the cargo and ship were distinct; and the decision was in conformity with *Davidson v. Case*. If the true doctrine is that the contract, in its integrity, passes to the abandoner, then the abandoner is entitled to the whole freight earned during a time the greater part of which may be antecedent to the creation of his title; as *497] if, because rent is incident to a house, a party purchasing a house were entitled to all arrearages of rent. The ship, in the present case, performed no service after the abandonment, except that of conveying a portion of the goods from Southport to Liverpool. [Lord CAMPBELL, C. J.—Would not a shipowner be entitled to something for that service?] He would, if contracted for. [Lord CAMPBELL, C. J.—

(a) Before Lord Campbell, C. J., Coleridge, Wightman, and Erie, Js.

(b) In Exch. Ch., affirming the judgment of K. B. in *Case v. Davidson*, 5 M. & S. 79.

But is not a contract impliedly raised by the carriage of the goods: that is the only contract which exists when freight is payable *pro ratâ itineris*.] In such a case, there has been a contract from the first. [WIGHTMAN, J.—Suppose the ship carried for a freight to be estimated by the time.] There the original contract is that from which the right is inferred. [ERLE, J.—Is not the analogy strong? The underwriter takes what the shipowner bargained for.] The analogy would rather seem to be the other way. Suppose the freight were paid beforehand. [ERLE, J.—In such a case could the freight be insured?] The owner of the goods would insure the goods at a value so much higher; he would include in his assurance what he expected to gain by the purchased service of the ship. [ERLE, J.—When the shipowner is owner of the goods he may be said to insure himself. WIGHTMAN, J.—You will say the case then is as if the shipowner paid himself beforehand.] That really represents his position. Would the underwriter be liable to the expense of carrying the goods in the lighters to Liverpool, or to the general average in saving them? [ERLE, J.—Supposing general average paid, and something gained by the goods being brought to Liverpool, these appear to attach more obviously as incidents to the ship than an actual contract would do.]

Blackburn, contrâ.—So far as regards the law in cases *where [498 the owner of the ship and the owner of the cargo are distinct persons, it is settled beyond doubt in *Stewart v. Greenock Marine Insurance Company*, 2 H. L. Ca. 159, S. C. 1 Macq. Sc. Ap. 328, a case the more strong because there the freight was so nearly earned by the shipowner; the total loss, upon which the abandonment was made, having taken place in the port of delivery. The principle of that case was fully upheld in *The Scottish Marine Insurance Company of Glasgow v. Turner*, 1 Macq. Sc. Ap. 334; though there it was considered that there was not, under the peculiar circumstances of the case, as between the parties in the cause, a total loss; so that the owners of the ship could not recover against the insurers on freight as for a loss of freight which the shipowners had been compelled to give up to the insurers on ship. There has, it is true, not been any decision directly on the case where the shipowner and the owner of the cargo are identical. But why is that which the shipowner gets by carrying his own goods in his own ship less earnings of the ship than what he gets by carrying the goods of others? The reasoning of Valin in the passage already brought before the Court (Lib. III. tit. 6, art. 15) is: “Je ne doute nullement que cet armateur assuré, en faisant l’abandon du navire, ne soit tenu d’abandonner tout de même ou de rapporter ce fret jusqu’à concurrence des marchandises sauvées. La raison est que ce fret étant dû au navire comme un fruit qui le suit de nature de chose, jusqu’à un nouveau chargement qui le remplace, est censé faire partie de sa valeur, et que ce n’est qu’en vue du fret qu’il peut faire, que le prix donné au navire à son départ peut légitimement être stipulé toujours subsistant durant tout le voyage.” It seems that the French law gives to the *underwriter the whole [499 freight, paid or not paid before the abandonment, which has been contracted for: (a) it appears to be looked upon as the compensation

(a) See Code de Commerce, art. 336. “Le fret des marchandises sauvées, quand même il aurait été payé d’avance, fait partie du délaissement du navire, et appartient également à l’assureur, sans préjudice des droits des prêteurs à la grosse, de ceux des matelots pour leur loyer, et

anticipated for the expenses, and the wear and tear of the vessel. That is put in *Émérigon, Traité des Assurances, &c.*, ch. 17, sect. 9 (vol. 2, p. 254, ed. Boulay Paty, 1827), who follows the same course of reasoning as Valin. The English law, it must be allowed, would not admit of the application of the rule to freight prepaid. And the American law, whether the freight be prepaid or not, divides it rateably: Phillips's *Treatise On the Law of Insurance*, § 1650 (ch. XVII. sect. 7, vol. 2, p. 352, 3d ed.); Arnould's *Treatise On the Law of Marine Insurance and Average*, sect. 403, note (t) (vol. 2, p. 1152, 2d ed.). [*Broun* referred to Kent's Commentaries, vol. 3, p. 333 (Part v. Lect. 48).] It is clear that, if the freight belong to the underwriters as being earned by the ship, the question whether there has been a contract is immaterial: and the doctrine that freight is the mother of wages rests upon the principle *500] that the freight is looked upon as *earned by the ship. [Lord CAMPBELL, C. J.—The Legislature has altered that.(a)] The common law policy, however, illustrates the connection between the freight and the ship. The profit which a shipowner makes by carrying his own goods may be insured as freight: *Flint v. Flemyng*, 1 B. & Ad. 45 (E. C. L. R. vol. 20). Bayley, J., there founds his opinion upon the ground that the shipowner, as well where he carries his own goods as where he carries those of another, expects to reimburse himself out of such profit for the expense of the ship, &c.; probably from his attention having been called, in *Case v. Davidson*, 5 M. & S. 79, to the passage in Valin. A merchant would probably keep the accounts separate where he carried his own goods; he would enter "Ship Melbourne, credit by adventure on timber for freight," and debit the adventure on timber to the ship for the freight, just as if they belonged to different persons, and he was agent for both. [Lord CAMPBELL, C. J.—It is clear, as you say, that he may insure the profit arising from carrying his own goods as "freight:" that shows that there may be freight arising in such a case, though a man cannot contract with himself. At present, I do not see how it is material that the owner of the ship is the same person as the owner of the goods. But the American law divides the freight.] But in that respect it differs from the English law, as appears from *Stewart v. Greenock Marine Insurance Company*, 2 H. L. Ca. 159, S. C. 1 Macq. Sc. Ap. 328. The objection that no bill of lading exists, in this case, which could be sued on by the shipowner is merely *501] formal. It is only because *he would be both plaintiff and defendant. [Lord CAMPBELL, C. J.—There are no parties to contract; no *aggregatio mentium*.] There may be said to be a quasi contract; it takes the character, and has the incidents, of a contract as soon as a second party is created. But, suppose he had endorsed the

des frais et dépenses pendant le voyage." See the suggestions and reasoning of the Commission de Commerce de l'Orient, in M. Loaré's comment on this article, *Esprit du Code de Commerce*, tom. 4, p. 284. The Cour de Cassation has decided that the words "marchandises sauvées" restrict the effect of this enactment, and exclude "les frets précédemment et successivement acquis et gagnés dans le cours de la navigation." See *Commentaire du Code de Commerce, &c.*, tom. 3, p. 491, by M. Alauzet, who remarks: "Cette dévotion nous semble inattaquable au point de vue du Code de Commerce; il est seulement permis de regretter que ces frets, successivement acquis et gagnés depuis le départ, qui représentent le détérioration subie par le navire depuis le moment où il a été estimé dans la police d'assurance, n'appartiennent pas aux assureurs, tenus de payer la valeur entière assurée."

(a) Stat. 17 & 18 Vict. c. 104. (The Merchant Shipping Act, 1854), sect. 183.

bill of lading over, under stat. 18 & 19 Vict. c. 111, s. 1, it would be as if a "contract had been made with" the endorsee "himself." Could not the endorsee then have sued on the bill? If he could, was there not, before the endorsement, that which, so far as regards parties other than the shipowner, had some of the incidents of a contract? As to the amount recoverable as freight, if it be merely a remuneration for the carriage from Southport to Liverpool, it would be but small: but it is important that this should be adjudged.

Broun, in reply.—The French law supplies no analogy. It seems as if the rule there adopted has resulted from mixing the municipal law with the mercantile law: and the extent to which it carries the transfer of the freight renders it inapplicable to the English law. *Émérigon's* language (tom. II. p. 255) is: "L'effet de l'abandon est de mettre l'assureur au lieu et place de l'assuré, comme si assuré ne fut, c'est-à-dire comme si l'entreprise nautique eût été étrangère à l'assuré." Another circumstance which destroys the applicability of the French law is that it does not permit the freight to be assured, as freight, but only as an accessory to the ship. *Émérigon* says (tom. II. p. 253): "Les nolis sont l'accessoire et les fruits civils du navire: *Vecturæ navis inter accessiones, seu fructus civiles annumerantur.* *Roccus*, de Navib., not. 63."(a) Now *Rocci* refers to the doctrine of the civil law, "quodd [*502 si navis a malæ fidei possessore petatur, fructus etiam percipiendos esse; quoniam periculum navis possessor petitori præstare non debet."(b) It is clear that *Rocci* has applied generally what was originally laid down for the special case of a party holding property in bad faith. The English authorities apply only to the case where there is a contract, and exclude prepaid freight. At most, the underwriters can get only the price of conveying from Southport to Liverpool. They might have put an end to the voyage at Southport: and then the case would have been as if the owner had been prepaid for the freight so far, since he would have then had his goods at Southport increased in value by their having been carried thither, or as if he had sold the goods at Southport for the price they were worth after being transported so far.

Lord CAMPBELL, C. J.—I must say that I, as at present advised, think the underwriter entitled to some freight. The American law seems not unreasonable. *Cur. adv. vult.*

Lord CAMPBELL, C. J., in this Term (November 25th), delivered the judgment of the Court.

In this case the first question which we are called upon to answer is, Whether anything in the nature of freight for the entire voyage from St. John to Liverpool passed to the underwriters on ship on the abandonment of the ship.

If the goods on board the ship at the time when the *casualty [*503 to which the abandonment refers occurred had belonged to third persons, for whom they were to be carried on freight from St. John to Liverpool, there can be no doubt that by our law the right to the whole of that freight would have passed to the abandonees of the ship. The

(a) P. 64, ed. Utrecht, 1703.

(b) See Dig. lib. vi. tit. 1, art. 62. Mr. Ingersoll, in his *Manual of Maritime Law* (p. 60, Philadelphia, 1809), commenting on this passage in *Rocci*, refers to Dig. Lib. vi. tit. 1, art 35, and appears to confine the application of *Rocci's* rule as suggested in the argument in the text.

abandonnees are considered as purchasers of the ship at the moment of the casualty to which the abandonment refers: and, although the contract of a shipowner does not run with the ship, it is well settled that, as incident to the ship, the right to the whole freight, pending at the time of the sale and subsequently earned, belongs to the purchaser of the ship. The American Courts, presuming that ship and freight are always separately insured, and taking into consideration the respective rights and equities of the different sets of underwriters where the loss is finally adjusted among all parties, assured and assurers, make an apportionment of the freight earned partly before and partly after the casualty for which the abandonment on ship is made; so that the freight earned previous to the casualty may go for the benefit of the underwriters on freight to whom there has been an abandonment, and only the freight earned after the casualty vests in the abandonnee on ship. (See the authorities collected, Arnould, sect. 404.) But (as in the present case), in adjusting the rights of assured and assurer on ship, we do not look beyond those parties; and the abandonnee of the ship, like the purchaser, has a right to the whole of the freight pending at the casualty, although he could not claim freight paid or completely earned in a prior part of the voyage: *Stewart v. Greenock Marine Insurance Company*, 2 *504] H. L. Ca. 159, S. C. 1 Macq. Sc. Ap. 386; **The Scottish Marine Insurance Company of Glasgow v. Turner*, 1 Macq. Sc. Ap. 334.

But, in the case which we have now to decide, at the time of the casualty there was no freight pending. The goods in the ship were the property of the owner of the ship; he was carrying them on his own account; and he could have no contract with himself. As between him and the underwriter on ship, it was quite immaterial that, under the designation of freight, he had insured with other underwriters the increased value of his goods by reason of their being carried from St. John to Liverpool. Considering, as a test, what would have passed to the purchaser on a sale of the ship at the time of the casualty, it seems clear that he could have had no claim against the vendor in respect of the goods having been carried in the ship from St. John to Southport before the sale. No more can the abandonnee. At the moment of the casualty, the goods had become more valuable to the owner from being carried the greatest part of the voyage; and he might have sold them afloat at an increased price. This is rather analogous to the case of freight earned and received by the owner of the ship before the abandonment, to which the abandonnee of the ship would have no claim. We are, therefore, of opinion that it is only for any benefit which the owner of the goods may have derived from the use of the ship subsequent to the casualty that the abandonnees can claim compensation in the nature of freight.

But, for so much of the cargo as was brought in the ship from Southport to Liverpool, we think such compensation is due from the plaintiff *505] as owner of the goods to the abandonnees. For the part of the cargo brought by the plaintiff in lighters from Southport to Liverpool we think no such compensation can be claimed; as this operation was conducted by the plaintiff himself for his own benefit: and this part of the cargo must be considered as finally severed from the ship at Southport.

The principle on which the compensation due ought to be calculated,

we think, is by considering for what sum the part of the cargo brought in the ship to Liverpool might have been conveniently forwarded from Southport to Liverpool in another ship, according to the current rate of freight to be adjusted by an average settler, according to the agreement of the parties.

Judgment accordingly.

NEISH and Another v. GRAHAM and Others. Nov. 17.

S. shipped goods on board plaintiff's ship, then at Glasgow, and bound for Lima. By the bill of lading the goods were to be delivered at Lima to defendant, "freight for the said goods to be paid by the shipper;" and in the margin was written: "freight payable one month after sailing, ship lost or not lost." S. handed the bill of lading to defendant's house at Glasgow (defendant having one also at Lima), who made thereon an advance to S.; the goods were consigned to defendant by S. for sale. S. did not pay the freight in the month; and plaintiff wrote to the master, informing him of this, and desiring him not to deliver the goods without payment of freight. Defendant at Lima demanded the goods; but the master, who had received the letter at Lima, refused to deliver them without payment of freight. Held that the master was justified in detaining them, the lien for freight as against the consignee not being waived by the terms of the bill of lading.

THIS was a case stated, without pleadings, for the opinion of this Court.

The plaintiffs are the owners of a vessel called *The Isabella*: the defendants are merchants trading at Liverpool under the firm of Graham, Kelly & Co., having a house at Lima, the firm there being Graham, Rowe & Co. In April, 1855, the plaintiffs put *The Isabella* on a berth at Glasgow, as a general ship for Lima. Messrs. Skinner, Notman & Co., of Glasgow, shipped on board of her 1000 [*506 cases of geneva.

The following is a copy of the bill of lading.

"Shipped, in good order and well-conditioned, by Skinner, Notman & Co., of Glasgow, in and upon the good ship or vessel called *The Isabella*, whereof is master for the present voyage, and now lying at Glasgow, and bound for Lima,

One thousand cases geneva

G. R. 1000 merchandise, being marked and numbered as in the margin, cases cont^d and are to be delivered in like good order and well-conditioned at the aforesaid port of Lima (the act of God," &c., ea. 12 bot- tioned at the aforesaid port of Lima (the act of God," &c., tles geneva. "excepted) unto Messrs. Graham, Rowe & Co., or their assigns.

"Freight for the said goods to be paid by the shipper at the rate of thirty-five shillings per ton, with five per cent. primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which being accomplished the other two to stand void.

"Dated in Glasgow, the 30th day of April, 1855.

"JAMES NORRIE.

"Contents unknown. Leakage and breakage excepted."

The goods were the property of Messrs. Skinner, Notman & Co., and were consigned by them to Messrs. Graham, Rowe & Co., for sale.

The bill of lading was handed by Messrs. Skinner, Notman & Co. to the defendants, who, in exchange for it, made them a large advance.

*507] The length of voyage from Glasgow to Lima is about *three and a half to four months. The vessel sailed for Lima in the month of May, 1855.

Messrs. Skinner, Notman & Co. made default in paying the freight at the expiration of the month. They soon afterwards stopped payment; and eventually their estate was sequestrated. The plaintiffs thereupon wrote out to Lima, with instructions to the master of The *Isabella* not to deliver the goods unless the freight was first paid. The master received this letter on his arrival at Lima, and refused to deliver up the goods unless the freight was paid, claiming a lien upon them. Graham, Rowe & Co. denied the lien, but undertook to pay the freight if it should be decided by an English Court of competent authority that the captain or owners had a lien on the goods. The captain thereupon delivered up the goods.

The question for the opinion of the Court is: Whether the plaintiffs had a lien on the goods as against the defendants for the freight mentioned in the bills of lading. If they had a lien, then judgment is to be entered for the plaintiffs for 57*l.* 18*s.* If they had not such lien, then judgment is to be entered for the defendants.

Kemplay, for the plaintiffs.—First, the plaintiffs had a lien as against the shippers, Skinner, Notman & Co. The general rule is that the shipowner has a lien for the freight against the shipper, except where there is something special in the contract, inconsistent with this right: *Maude and Pollock's Compendium of the Law of Merchant Shipping*, p. 171. The freight was here to be paid in a month, which would probably be before delivery; but the payment was still for the carriage. It was to be paid whether the ship was lost or not lost: that would *make a difference as to who would be the party to insure; but *508] the payment was still due as for freight; and the lien would not be affected. [Lord CAMPBELL, C. J.—In the contemplation of the parties, when the master arrived at Lima, it would not be known there whether the freight had been paid or not. Was the master, in such a case, to detain the goods till he learned that the freight was paid? That seems to be the result: but, no doubt, it might place him in a difficult position. Secondly, if the plaintiffs had the lien as against Skinner, Notman & Co., they had it as against the defendants. The property does not appear to have been transferred to the defendants, who were to sell and account to Skinner, Notman & Co. for the proceeds. Even if the property had been transferred, so as to give a lien as against the defendants, that would be posterior to the lien as against Skinner, Notman & Co., which could not be divested by the arrangements between them and a third party: *Small v. Moates*, 9 Bing. 574 (E. C. L. R. vol. 23), which was fully confirmed in *Gledstanès v. Allen*, 12 Com. B. 202 (E. C. L. R. vol. 74), and is in accordance with *Faith v. The East India Company*, 4 B. & Ald. 630 (E. C. L. R. vol. 6), and *Campion v. Colvin*, 3 New Ca. 17 (E. C. L. R. vol. 32). [WIGHTMAN, J.—Suppose the question had arisen by the ship arriving before the expiration of the month.] There could then have been no lien, and the freight would have been due only upon a previous delivery of the goods: *Staunton v. Wood*, 16 Q. B. 638 (E. C. L. R. vol. 71). Suppose Skinner, Notman & Co. had gone out in the ship with the goods: the master might have refused the goods to them till the freight was paid, if the ship arrived

after the expiration of the month. The case is not *like Howard v. Tucker, 1 B. & Ad. 712 (E. C. L. R. vol. 70), where the endorsee of a bill of lading for value, which stated untruly that the freight had been paid, was held to be entitled to receive the goods without payment of freight: here is no misstatement. The case is not distinguishable from *Gilkison v. Middleton*, 2 Com. B. N. S. 134 (E. C. L. R. vol. 89). There S. & Co. chartered a ship, the property of the plaintiffs, for a voyage from Liverpool to Singapore; and S. & Co. shipped their own goods on board, taking bills of lading made at Liverpool, by which the goods were to be delivered at Singapore to the defendants, "Messrs. Middleton & Co., or their assigns, paying freight for the said goods here as per margin:" and the margin, besides specifying the amount of freight, had "Freight payable in Liverpool one month after sailing of vessel, lost or not lost." These bills were handed by S. & Co. to the defendants, who had accepted bills of S. & Co., as an advance on the consignment. Several questions, not raised here, arose: but, as to the freight in the bill of lading, it was held that the plaintiffs were entitled to withhold the goods, on their lien to that amount, from the defendants at Singapore.

Mellish, contra.—No doubt there is a lien here, unless the bill of lading shows that it is waived. It must also be admitted that *Gilkison v. Middleton* in many respects strongly resembles the present case. But there the bill of lading showed that the defendants were, or at least might be, the parties to pay the freight: here the bill of lading expressly states "freight for the said goods to be paid by the shipper" "one month after sailing, ship lost or not lost." The question in *Gilkison v. Middleton* was whether the simple circumstance *of the freight being made payable at the port of lading within a month from [*510 the sailing altered the ordinary rule. But the defendants contend that here the express agreement for the shipper to pay the freight does constitute a waiver of the claim against the holder of the bill of lading. [Lord CAMPBELL, C. J.—In *Gilkison v. Middleton* the stipulation in the margin that the freight was to be paid at Liverpool, the port of lading, overrode the stipulation in the body of the bill.] The defendants there had a house at Liverpool, as well as at Singapore. It could not be expected that on the arrival at Lima it would be known whether or not the freight had been in fact paid. It is true that it did so happen that a letter arrived, announcing this, before the demand of delivery. But that was accidental. Suppose the freight had been paid after the letter had been written, the refusal to deliver would have been illegal. [Lord CAMPBELL, C. J.—I suppose the captain would run the risk of delivering the goods unless he knew that the freight had not been paid. WIGHTMAN, J.—Your difficulty would exist in such a case as *Gilkison v. Middleton*, 2 Com. B. N. S. 134 (E. C. L. R. vol. 89).] That is so, certainly. But the point for which that case is now cited was not the main point there in dispute. What can have been the reason for framing the bill of lading here in a form varying from that which is usual, except to indicate that the party to pay was, not the consignee, but the shipper?

Kemplay, contra, was not called on to reply.

Lord CAMPBELL, C. J.—If *Gilkison v. Middleton* had been cited earlier in the argument, we should have *relieved Mr. *Kemplay* [*511 sooner. It is a decision exactly in point. But for that case, it

might have been argued that, though there is always a lien where it is not waived, yet there is such a waiver when the freight is to be paid at the port of discharge within a month from the sailing of the ship. But we find that the Court of Common Pleas, in a case quite in point, has decided otherwise: and I am not at all prepared to disagree with them. At all events, here is an express decision by a Court of co-ordinate jurisdiction. Mr. *Mellish* points out that in that case the bill of lading did not express that the freight was to be paid by the shipper. But freight, which is to be paid at the port of lading, must be meant to be paid by the shipper, and not by the consignee who is in a different part of the globe.

COLERIDGE, J.—I cannot distinguish *Gilkison v. Middleton* from this case.

WIGHTMAN, J.—The cases are really the same.

ERLE, J.—The general rule is that there is a lien on the freight unless it be waived. The question, whether a stipulation like that now insisted on is a waiver, was considered in *Gilkison v. Middleton*, where the Common Pleas held that, in such a case, the consignee takes the bill subject to the risk of the payment having been already made.

Judgment for plaintiffs.

The foregoing case was doubted in 33 Law Times, 81; see the American *Kirchner v. Venus*, 5 Jur. N. S. 395; note to *Foster v. Colby*, 3 H. & N. 719.

***512] *ANTHONY NORRIS, Administrator of JOHN SADLEIR, v. The IRISH LAND COMPANY. Nov. 17.**

Declaration, by administrator of S., against a company, alleged that defendants were incorporated by charter, subject to a direction therein contained, that the persons in the charter mentioned, and all other members of the Corporation, should, within one year from the date of the charter, execute a deed, whereby (among other things) provision should be made for the registration of all the members of the Company, from time to time, in proper books, and for the general management of the affairs of the Corporation by a board of directors. It was further alleged that a deed was prepared, containing such provisions, providing that the affairs should be managed by a board of directors, and that the board should cause the name, profession, or calling, and place of residence, of every person who should be, or from time to time should become, a proprietor of one or more shares, and the number of shares, for the time being belonging to each such proprietor, to be entered in a book to be called The Register of Shareholders, and should cause the shares for the time being in the Company to be numbered in regular progressive order, &c.; and, on any person ceasing to be a proprietor, and on any person becoming a proprietor, the board should cause an entry to that effect to be made in such book, it being declared to be the expressed agreement and understanding of all the parties to the said deed that the register of shareholders should at all times show, and be evidence of, the persons who were the proprietors for the time being, and the number of shares held by each; and that, for that purpose, the entries which should be made in the book should be at all times binding and conclusive upon and against all the proprietors for the time being: that, as between the proprietors for the time being and their real and personal representatives, all the estates, funds, and property of the Company, and the shares of each proprietor in the capital of the Company, should be considered as personal estate, and be transmissible as such. That personal representatives should not in that capacity be proprietors of shares belonging to testators or intestates, but might become proprietors, or procure some person to become proprietor, by giving certain notice of their desire of becoming a proprietor, and executing a covenant to abide by the deed; and, on paying arrears, should be entitled to call on the board to enter their names in the Register as proprietors, and on such entry should become proprietors; and the board should cause such entry to be made. That S. became, and was entered as, a proprietor, and was so at the time of his death; and plaintiff had given the required

notice of his desire of becoming a proprietor, and had done all things to entitle him to have the shares entered as his shares, and to have an entry made of S. having ceased to be proprietor; but the defendants refused to make the entry: and the plaintiff claimed damages, and also a mandamus commanding defendants to make the entry, he alleging that he was personally interested.

Held: that plaintiff was entitled to the mandamus.

Seemle, that the remedy by mandamus given by sect. 68 of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), is not confined to cases in which the prerogative writ of mandamus might have been granted.

It appearing that there was an issue of fact upon the count containing the claim of damages and prayer for the mandamus, the Court suspended the mandamus till the issue of fact should be tried.

THE declaration alleged that Her Majesty Queen Victoria, by Her Royal charter or letters patent, dated 23d March, 1852, gave, granted, and ordained that *the said John Sadleir, and certain other persons therein named, and all such other persons and bodies [*513 politic or corporate as had become, or from time to time thereafter might become, members of a certain Company which had been agreed to be formed, and should hold therein a share or shares of not less than 10*l*. each, should be one body politic and corporate by the name of The Irish Land Company, subject to the directions and provisions therein contained. That (among other directions and provisions of the said charter or letters patent not material to be here set forth) it was thereby directed and ordained that the said persons in the said charter mentioned, and all other the then existing members of the said Corporation, should, within one year from the date thereof, enter into and execute a proper deed of copartnership and settlement: whereby the capital of the said Company, consisting of 500,000*l*., should be divided into 20,000 shares of 25*l*. each: and whereby provision should be made for (among other things) the registration of the names of all the members of the Company from time to time, in proper books, to be provided for that purpose, and for the general management of the affairs of the said Corporation by a board of Directors: And it was by the said charter or letters patent further directed and ordained that such deed of settlement should be prepared to the satisfaction, in all respects, of the president for the time being of the Board of Trade. That afterwards a deed of copartnership or settlement, containing the said provisions above mentioned and all other clauses or provisions by the said charter or letters patent required or directed, was duly entered into and executed, and that all things were done and happened which were necessary to make the said deed a good and *sufficient deed according to the direction of the said charter or letters patent. That, by the said [*514 deed, it was (among other things) covenanted and declared that certain persons, who then executed the said deed, and were parties thereto of the first part, and of whom the said John Sadleir was one, and the several other persons who should become proprietors as thereafter mentioned, should, while holding shares in the capital of the Company, be and continue a Company under the name or style of The Irish Land Company, for the purposes therein mentioned: that the capital of the Company should consist of the sum of 500,000*l*., and be divided into 20,000 shares of 25*l*. each: that (subject and without prejudice to the powers thereafter given to the general meeting of proprietors) the affairs of the Company should be managed and conducted by, and under

the superintendence and direction of, a board of directors as in the said charter was provided: that the board of directors should cause the name, profession or calling, and place of residence, of every person who should be, or from time to time should become, a proprietor of one or more shares, and the number of shares for the time being belonging to each such proprietor, to be entered in a book to be kept for that purpose, to be called The Register of Shareholders, and should cause the shares for the time being in the Company to be numbered in regular progressive order, beginning with No. 1; and should cause every share, notwithstanding any change of ownership, to continue to be distinguished by the same number as formerly: and, on any person ceasing to be a proprietor of the Company in respect of any share, and on any person becoming a proprietor, the board should cause an entry

***515]** to that effect to be made in such book, it being declared to be the expressed agreement and understanding of all the parties to the said deed that the book called The Register of Shareholders should at all times show, and be evidence of, the persons who were the proprietors for the time being of the Company, and the number of shares held by each proprietor; and that, for that purpose, the entries which should be made in the said book in manner aforesaid, should be at all times binding and conclusive upon and against all the proprietors for the time being of and in the Company: that, as between the proprietors for the time being and their real and personal representatives, all the estates, funds, and property of the Company, and the shares of each proprietor in the capital of the Company, should be considered as personal estate, and be transmissible as such: that the legatees and next of kin of a deceased proprietor should not, in either of those capacities, be entitled to make any claim upon the Company in respect of any shares of such deceased proprietor; but, as between the legatees or next of kin of a deceased proprietor and the Company, the executors or administrators of such deceased proprietor should be the only persons who might become proprietors in respect of the shares of such deceased proprietors: that the executors or administrators of a deceased proprietor should not, in those capacities, be proprietors of any shares which belonged to their testator or intestate; but such executors or administrators might, in the manner and upon the terms next mentioned, either become proprietors, or procure some person to become a proprietor in respect of such shares or any of them: that, before the executors or administrators of any deceased proprietor could become proprietors, or

***516]** could procure any other person to become a proprietor, in respect of all or any of the shares which belonged to their testator or intestate, they should leave, or cause to be left, at the office of the Company for the space of five days the probate of the will or the letters of administration, to the end that minutes or extracts of the same might be entered in the books of the Company; that, if the executors or administrators of any deceased proprietor should be desirous of becoming proprietors in respect of all or any of the shares which belonged to their testator or intestate, and should respectively give notice under their hands at the office of the Company of such their desire, and should subscribe in such notice their names, professions or callings, and place of abode, and the number of shares in respect of which they should be desirous of becoming proprietors, such executors

or administrators should, upon executing at the office of the Company, or at such other place as should be required as therein mentioned, a deed of covenant to abide by the provisions of the said deed of copartnership or settlement, and other the rules and regulations of the Company in respect of the shares for or in respect of which they should have given such notice; and, upon paying the arrears (if any) of any instalment or call actually due and payable upon such shares, be entitled to call upon the board of directors to enter their names in the aforesaid share register book as proprietors of such shares; and, upon such entry being made, they should become the proprietors thereof; and the board should accordingly cause such entry to be made. That, by virtue of the said charter or letters patent, the defendants duly became and were a Company by the name or style aforesaid; and that a board of directors was duly *appointed for the managing and conducting of the affairs of the said Company; and that the defendants were, up to and at the time of the breach of the duty hereinafter mentioned, a subsisting Company regulated and carrying on business upon and according to the provisions of the said charter or letters patent, and of the said deed of settlement; and that such book as by the said deed directed, called The Register of Shareholders, was duly kept, and entries made therein, according to the provisions of the said deed. That the said John Sadleir duly executed the said deed, and at the time of his death was, and was duly entered in the said register as, the holder of 160 shares in the capital of the said Company, which had been duly numbered by the board of directors, and the number of which was duly entered in the said register; that is to say from 3751 to 3850, both inclusive, and from 6911 to 6970, both inclusive. That the said John Sadleir did all things on his part, and all things happened, which were necessary for his being, at the time of his death, a proprietor in the Company in respect of the said shares within the meaning of the said deed; and that he in fact at that time was, and was duly registered as, such proprietor accordingly. That the said John Sadleir died; and that letters of administration were duly granted to him the plaintiff, as the administrator of the said John Sadleir; and he, the plaintiff, more than five days before the giving of the notice hereinafter mentioned, caused the said letters of administration to be left at the office of the said Company. That afterwards he became desirous of becoming a proprietor in the said Company in respect of the said shares above mentioned which had belonged to the said John Sadleir, according to the provisions of the said deed in that *behalf; and that thereupon he gave such notice of his desire, and did all such things as on his part are required to be done, and all things happened which were necessary, in order to entitle him to call upon the said board of directors of the said Company to enter the name of him, the plaintiff, in the said share register book as the proprietor in his own right of the said shares above mentioned; and all things happened and were done on the part of the plaintiff, as such administrator as aforesaid, which were necessary to entitle him, the plaintiff, as such administrator, to have the said shares entered in the said register as the shares of him, the plaintiff, in his own right, and to entitle him to have an entry made in the said register of the said John Sadleir having ceased to be a proprietor of the Company in respect of the said shares: Yet the defendants refused to enter, or cause to be entered, the name of

him, the plaintiff, in the said share register book as the proprietor in his own right of the said shares above mentioned, or to make, or cause to be made, any entry thereon of the said John Sadleir having ceased to be a proprietor of the Company in respect of the said shares. By reason whereof the name of the said John Sadleir is still entered upon the said register as that of the proprietor of the said shares; and the debts, estate, and effects which were of the said John Sadleir at the time of his death, and of which the plaintiff was such administrator, remained, and still remain, liable to the payment of all calls, instalments, claims, and demands which may hereafter become payable or arise upon or in respect of the said shares or any of them: and also the plaintiff, as such administrator, has been prevented from realizing and converting into money the said shares, and applying the proceeds *519] thereof to and for the benefit of the estate of the said John Sadleir; and the plaintiff, as such administrator, claims 50*l*. And, for entitling him to a writ of mandamus, according to the provisions of The Common Law Procedure Act, 1854, the plaintiff, as such administrator, further says that the said shares are still entered and standing in the said register in the name of the said John Sadleir; that the said shares are respectively numbered and are entered in the said register, as being respectively numbered, by the following numbers; that is to say, from 3751 to 3850, both inclusive, and from 6911 to 6970, both inclusive. That plaintiff, as such administrator, is personally interested in the defendants' entering, or causing to be entered, the said shares in the said register, as being the shares of him, the plaintiff, in his own right; and in the defendants' making, or causing to be made, an entry in the said register of the said John Sadleir having ceased to be a proprietor of the Company in respect of the said shares; and that he, as such administrator, and the debts, estate, and effects to be so administered by him as aforesaid, may sustain damage by the non-performance by the defendants of their duties of making, or causing to be made, the said entries respectively upon the register; and that performance of the said duties respectively has been demanded by him of the defendants; and a reasonable time has since elapsed for such performance; but such performance has been neglected: and the plaintiff, by virtue of the statute in that behalf, claims a writ of mandamus, commanding the defendants that they enter, or cause to be entered, the said shares numbered respectively from 3751 to 3850, both inclusive, and from 6911 *520] to 6970, both inclusive, in The Register of Shareholders *of the said Irish Land Company, as being the shares of Anthony Norris, the plaintiff, in his own right; and further commanding the defendants that they do also make, or cause to be made, an entry in the same register of the said John Sadleir having ceased to be a proprietor of the Company in respect of the said shares above mentioned, or to that effect.

Demurrer to "so much of the declaration as contains or relates to a claim for mandamus."

Joinder.

Aspland, for the defendants.—This is not a case in which a mandamus will be granted by this Court under sect. 68 of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). There is no statutory duty, nor even one founded on the charter; for that provides only for a

deed. In *Benson v. Paull*, 6 E. & B. 273 (E. C. L. R. vol. 88), this Court refused a mandamus to enforce the execution of a lease which had been contracted for; Lord Campbell, C. J., saying: "I think the enactment must be confined to such duties as might have been enforced by a prerogative writ of mandamus." Now, as to that, the practice is stated in *Chitty's Practice of the Law*, vol. 1, p. 789. "The power of issuing writs of mandamus," it is said, is used by this Court "principally for public purposes, and to enforce performance of public rights or duties, and generally speaking, it is issued only to enforce a public right or a public duty; and therefore the Court will not grant a mandamus to a trading corporation at the instance of one of its members, to compel them to produce their accounts for the purpose of declaring a *dividend of the profits." And reference is made to *Rex v. The Bank of England*, 2 B. & Ald. 620, and *Rex v. The London Assurance Company*, 5 B. & Ald. 899 (E. C. L. R. vol. 7), which fully establish the doctrine laid down. Yet The Bank of England existed by statute, and The London Assurance Company by charter granted under express statute.^(a) The application in *Rex v. The London Assurance Company*, 5 B. & Ald. 899 (E. C. L. R. vol. 7), was for a mandamus commanding the defendants to permit a transfer of stock in their books, and is not distinguishable from the application made in the present case. *Ex parte Robins*, 7 Dowl. P. C. 566, is another example of the same principle; where Patteson, J., said: "The Court will never grant a mandamus to enforce the general law of the land, which may be enforced by an action." [COLERIDGE, J.—Sect. 68 suggests the union of an action upon a private right with an application for a mandamus. How is that consistent with your present line of argument?] Suppose the Chamberlain of London were bound, as a public officer, to swear in parties duly appointed to certain offices; and he refused to do so, whereby a party lost fees. The section might well apply to a case like that, because, though an action would lie, the duty devolves upon the Chamberlain as a public officer. [Lord CAMPBELL, C. J.—The section might perhaps be inapplicable in the case of a mere contract: but here the complaint is of a breach of duty.] It is a duty ultimately referable to contract. If there be, as there is in the case of a mandamus, any discretion in the Court, it should seem that the discretion will hardly be exercised here in favour of the remedy, inasmuch as it is a case in which conflicting *equities may well arise, for the discussion of which this tribunal is scarcely adapted. Sect. 77 shows that the Legislature had in view only cases analogous to those of a prerogative writ of mandamus. There is no doubt that an action will often lie at the suit of an individual for a neglect of public duty, even where such neglect is indictable: *The Mayor and Burgesses of Lyme Regis v. Henley*, 1 New Ca. 222,^(b) is an instance. This shows that union of a right of action with a power to ask for the enforcement of a public duty, to which sect. 68 refers. Further, the declaration here asks for damages for the non-performance of the act required: if such damages were satisfied, the act called for would become unnecessary. Again,

(a) 6 G. 1, c. 18, s. 1. See stat. 5 G. 4, c. 114.

(b) In *Dom. Proc.*, affirming the judgment of K. B. in *The Mayor and Burgesses of Lyme Regis v. Henley*, 3 B. & Ad. 77 (E. C. L. R. vol. 23), which affirmed the judgment of C. P. in *Henley v. The Mayor of Lyme*, 5 Bing. 91 (E. C. L. R. vol. 15).

the mandatory order should go to the board of directors, not to the Company. The directors alone are required to keep the register. In sect. 9 of The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), the duty is laid on the company; and, under that Act, the mandamus, if at all, would go to the company. Here it is otherwise.

Macnamara, contra.—This is a company created by charter; and the charter requires that the deed shall make provision for the registration of the names of all the proprietors; and the deed does so. The duty of obeying the provision so made is therefore a duty arising from charter. And it is a duty in the performance of which not merely the shareholders are interested, but the public also, to whom it is important that *523] there should *be accurate information accessible as to the shareholders. The remedy by mandamus has, in modern times, been granted more largely than was formerly done; and there is no practical distinction between companies existing by statute and companies existing by charter. In *Regina v. Derbyshire, &c., Railway*, 3 E. & B. 784 (E. C. L. R. vol. 77), the defendants were a railway Company incorporated by a public local and personal Act, incorporating The Companies Clauses Consolidation Act, 1845, sect. 36 of which allows of execution against individual shareholders, to the extent of their shares not paid up, in cases where there is not property of the Company sufficient to satisfy the execution: and the Court held that this entitled a judgment creditor to a mandamus commanding the Company to give him inspection of the register of shareholders. In *Rex v. Worcester Canal Company*, 1 Man. & R. 529 (E. C. L. R. vol. 17), a mandamus was granted commanding a company, incorporated by statute, to enter on their books the probate of the will of a deceased shareholder. In many cases, where application has been made for a mandamus commanding a company to register memorials of transfers, the objection now made might have been urged, but was not: such are *Regina v. Londonderry and Coleraine Railway Company*, 13 Q. B. 998 (E. C. L. R. vol. 66); *Regina v. Wing*, 17 Q. B. 645 (E. C. L. R. vol. 79); *Regina v. General Cemetery Company*, 6 E. & B. 415 (E. C. L. R. vol. 88). In *Regina v. Saddlers' Company*, 1 Bail Court Ca. 183, a mandamus went to a company incorporated by royal charter. In *Regina v. Commissioners of Woods and Forests*, 15 Q. B. 761 (E. C. L. R. vol. 69), it was assumed by the Court that, if there had been what amounted to a contract on *524] the part of the defendants, the mandamus would have gone; *and that this would have been so had the case been that of a private company. A mandamus was granted to swear in a director of the Amicable Assurance, which is a company created by charter from the Crown: Anonymous, case in *Strange* (2 Str. 696). "Mandamus is granted to prevent failure of justice, and for the execution of the common law, or of a statute, or of the King's charter:" Com. Dig. *Mandamus* (A) Rose's edition, citing Lord Hardwicke, C. J., in *Rex v. Wheeler*, Ca. K. B. temp. Hard. 99. As to the cases cited on the other side, respecting mandamus: in *Rex v. The Bank of England*, 2 B. & Ald. 620, the Court pointed out that the Court of Queen's Bench "is a very unfit tribunal" to take "accounts:" in *Rex v. The London Assurance Company*, 5 B. & Ald. 899 (E. C. L. R. vol. 7), the Court decided, on motion for a rule, without taking time for consideration; and the case occurred in 1822, since which time the discretion of the

Court on this point has been exercised more liberally: in *Ex parte Robins*, 7 Dowl. P. C. 566, there was no duty, either by statute or charter; and the Court refused to grant the writ in respect of the right by the general law. As to the applicability of sect. 68 of The Common Law Procedure Act, 1854: the Court has already distinguished *Benson v. Paull*, 6 E. & B. 273 (E. C. L. R. vol. 88); that was an attempt to obtain a mandamus commanding the execution of a mere contract for a lease. [Lord CAMPBELL, C. J.—We could not have granted that application unless we had possessed the general power of compelling a specific performance.] The Court, as there pointed out, has no machinery for determining whether a lease be a proper one, as a Court of equity has. Sect. 68 extends the remedy by a mandamus, by *allowing it in [*525 cases where a private action lies, which, before the Act, would have constituted an objection to granting the writ. Sect. 77 is applicable to a prerogative writ of mandamus only; the preceding sections do not speak of the prerogative writ: the object of sect. 77 was merely to put the procedure in the case of a prerogative writ within the regulations of the statute. It is no objection that the plaintiff claims damages: they are for what is past. [Lord CAMPBELL, C. J.—The Legislature has put an end to that objection.] It is argued that the mandamus ought to go to the directors: but they are only the agents of the Company.

Aspland, in reply.—The plaintiff asks not merely for registration but for transfer. Now the right to the transfer rests exclusively on the language of the deed. The attempt therefore is to obtain a mandamus, not in respect of a chartered duty, but for enforcing a private deed between parties.

Lord CAMPBELL, C. J.—I am of opinion that the plaintiff is entitled to judgment, under sect. 68 of The Common Law Procedure Act, 1854. He claims a writ of mandamus to compel the defendant to fulfil a "duty in the fulfilment of which the plaintiff is personally interested." He desires to have his name registered in The Register of Shareholders. The Company is created by royal charter. Under that there ought to be, and in fact is, a book which is that register: and it is in this book that the plaintiff seeks to have his name registered. Is not this the case contemplated by sect. 68, which, along with an action for damages for not doing an act, entitles a party to a mandamus to compel the doing of the *act? I adhere to the judgment in *Benson v. Paull*, 6 E. & B. 273 (E. C. L. R. vol. 88), the effect of which [*526 is that, where there is merely a private contract, we cannot enforce its performance. Without referring to what one knows of the history of the statute, it is clear from the language used that the Legislature did not intend to give to the Courts of common law the power to enforce the specific performance of all contracts, as, for instance, such as are merely personal. But this is not an attempt to enforce a personal contract, as was the case in *Benson v. Paull*, 6 E. & B. 273 (E. C. L. R. vol. 88), where the plaintiff merely insisted on a personal contract to grant him a lease. According to the report, I appear to have said that the remedy is confined to cases where the performance would, before the Act, have been enforced by a prerogative writ of mandamus. I am not now prepared to adhere to that. But in the case now before us a prerogative writ of mandamus would have been granted; it would have

gone to order that to be done which ought to be done by a company established by royal charter. It would be too wide to say that the Legislature intended to give the remedy in the case of every contract. But where there is a duty, in the fulfilment of which the plaintiff is personally interested, and which ought to be fulfilled under royal charter, the non-performance being a grievance to an individual, that is clearly a case within the intention of the Legislature: and it is precisely this case. The plaintiff is entitled to the shares: the Company refuse to register his name: before the Act, in such a case, a prerogative writ would have been granted. Therefore, even consistently with all that is said in *Benson v. Paul*, 6 E. & B. 273 (E. C. L. R. vol. 88), the plaintiff is entitled to judgment.

*527] *COLERIDGE, J.—I am of the same opinion. If I agreed that we were limited, in the application of sect. 68, to cases where, before the statute, a prerogative writ of mandamus would have been granted, I still should say that the plaintiff in this case is entitled to the mandamus. Here is a royal charter, which directs that there shall be a deed containing, among other things, a provision for registration. A deed is prepared accordingly: and all that is done under that deed is done under royal charter. The public are largely interested in carrying out this provision of the deed. I agree with Mr. *Macnamara* that of late years the inclination of the Courts has been to enlarge the remedy by mandamus, and that a mandamus would have been granted, in this case, without reference to the Act. But, though this is my opinion, I think it right to add that I do not, as at present advised, agree with Mr. *Aspland* in his construction of sect. 68. I am not prepared to object to the case of *Benson v. Paull*, 6 E. & B. 273 (E. C. L. R. vol. 88). I was not a party to that decision; but I entirely concur in it, though I do not concur in some of the expressions there used by the members of the Court. I cannot say that it was not intended to extend the remedy to cases more private in their nature than those in which the prerogative writ may be granted; how far it was to be extended I need not now say.

WIGHTMAN, J.—I entirely concur; and I agree that this case is distinguishable from *Benson v. Paull*. We have here a company, incorporated by charter, whose duty it is to keep the register and insert there the names of the proprietors; and a mandamus is asked for to compel *528] the performance of this duty. Even taking the *view which my Lord appears to have taken in *Benson v. Paull*, that we are to apply the statute only in cases where a prerogative writ would be granted, I think this is such a case, and that the prerogative writ would have been granted here. My Lord, on consideration, does not think that the Act is to be construed so strictly: certainly, however, we should not grant a mandamus for the purpose of enforcing the performance of a mere personal contract like that in *Benson v. Paull*; we have no machinery for that. If we were to require defendant to prepare a lease in accordance with a contract, there would be great difficulty in saying whether a particular lease was conformable to the contract or not: so that we could not apply the 68th section.

(ERLE, J., was absent.)

Macnamara asked the Court to issue a peremptory mandamus, under sect. 71.

Aspland.—There is an issue in fact on the count; and it does not appear what the result will be.

Macnamara.—The prayer for the mandamus is in the nature of a distinct count.

WIGHTMAN, J.—No: it is a part of the same count.

Per CURIAM.—Let the issue of a mandamus be suspended till the issue in fact is tried. Judgment for plaintiff.

*The QUEEN v. The Board of Works for the District of ST. OLAVE'S, SOUTHWARK. Nov. 18. [*529]

A certiorari issued to bring up an order of the Metropolitan Board of Works made, under stat. 18 & 19 Vict. c. 120, s. 214, on an appeal from a decision of the district board, by which order compensation was granted to D. as an officer to certain commissioners. The certiorari is taken away by sect. 230. This certiorari was issued on affidavits by which it appeared that D. was not an officer, and that consequently the order was made without jurisdiction. On showing cause against a rule to quash this order:

Held, that the Board of Works had jurisdiction on the appeal to decide whether D. was an officer or not; and that, even assuming that their decision was wrong in fact, the order was not without jurisdiction. The rule to quash the order was discharged, and the writ of certiorari quashed, *quia improvidè emanavit*.

An order of The Metropolitan Board of Works, made on an appeal against the decision of the Board of Works for the district of St. Olave's, Southwark, rejecting the claim of Charles Thomas Defree for compensation, having been brought up on certiorari, *Pashley*, on behalf of the Board of Works for the district of St. Olave's, Southwark, obtained a rule to quash the order.

From the affidavits on which the certiorari and rule were obtained, it appeared that Mr. Defree had been Clerk of the works to the Commissioners, under stat. 6 G. 3, c. 24, (a) for the East division of Southwark, at an annual salary. In the latter part of the year 1855 some proceedings took place, the effect of which, according to the view taken by the Board of Works of St. Olave's, Southwark, was that Mr. Defree before the end of that year had resigned his office, and his resignation had been accepted by the Commissioners. It was not admitted by the counsel who appeared in support of the order that such *was the effect [*530] of the proceedings; but, the decision of this Court being adverse to the Board of Works of St. Olave's, Southwark, on the assumption that the fact was as they took it to be, it is unnecessary in this report to state more of the details of these proceedings.

The Act for the Better Local Management of the Metropolis (18 & 19 Vict. c. 120) came into operation on the 1st of January, 1856; (b) and the functions of the Commissioners of the East division of Southwark were then put an end to by sect. 90. Mr. Defree applied, under sect. 214, to the Board of Works for the district of St. Olave's, Southwark, for compensation: his claim was rejected; and he appealed to

(a) "For paving the streets and lanes within the town and borough of Southwark, and certain parts adjacent, in the county of Surrey; and for cleansing, lighting, and watching the same; and also the courts, yards, alleys, and passages adjoining thereto; and for preventing annoyances therein."

(b) Sect. 251.

The Metropolitan Board of Works. The Metropolitan Board of Works entertained his appeal; and, after several adjournments and divisions, at last by a narrow majority awarded him compensation. In pursuance of their award the order complained of was made. It commenced by a recital that, before and at the passing of stat. 18 & 19 Vict. c. 120, C. T. Defree was an officer, to wit, a Clerk of the works to certain Commissioners, whose powers in relation to paving, cleansing, lighting, and watching certain parishes were determined by the Act; and did, within six months after the commencement of the Act, make a claim for compensation in respect of his loss of emoluments as such officer, arising from the passing of the Act, to the Board of Works for the district of St. Olave's, Southwark, in which his office had existed: that his claim was rejected: that he, within one month after notice of such rejection, had appealed to the Metropolitan Board of Works; who had considered all the circumstances of the case; and it appeared to them that C. T. *531] Defree was "entitled to *compensation for his said loss of emoluments, and that compensation ought to be awarded to him in respect thereof. Thereupon the said Metropolitan Board of Works do hereby award compensation to the said C. T. Defree in respect of his said loss of emoluments, such compensation to consist," &c. The order then specified the compensation. The ground on which the certiorari was obtained was that, Defree not being an officer at the time the Act came into operation, The Metropolitan Board of Works had no jurisdiction to make the order.

Sir *F. Thesiger* and *Bodkin* now showed cause against the rule for quashing the order.—By sect. 230 of stat. 18 & 19 Vict. c. 120, "No act, order, or proceeding in pursuance of this Act, or in relation to the execution thereof, shall be quashed or vacated for want of form; nor shall the same be removed by certiorari or otherwise into any of the superior Courts, except as herein specially provided." These latter words have been apparently left in the Act by inadvertence; for there are no such special provisions; so that the certiorari is taken away absolutely. It is true that, if the Metropolitan Board of Works had no jurisdiction at all, the certiorari might issue; for then the order could not be said to have been made in pursuance of the Act. The test in such cases is whether, under the circumstances, the parties making the order had jurisdiction to institute the inquiry, not whether they have decided rightly or not. Here the jurisdiction is given by sect. 214. It provides that "every officer to any commissioners," &c., may, within six months, make a claim for compensation to the vestry or the district board according to the nature of his office; and they may award him *532] such compensation as they *consider just under the circumstances of the case, subject to confirmation by the Metropolitan Board of Works; "and any person making any such claim to compensation whose claim is rejected by any vestry or district board may, within one month after notice to him of the rejection thereof, appeal against the determination of such vestry or district board, to the Metropolitan Board of Works, and such Board shall consider all the circumstances of the case, and may, if it appear to them just, award compensation to the claimant in like manner as the vestry or district board are herein empowered to do; and the determination or award of the said Metropolitan Board in reference to such claim shall be final." Under this section

Defree had a right to appeal; and it is no answer to say that he was not an officer, and therefore had no right to compensation. That was the very point to be decided on appeal; and the Metropolitan Board of Works not only had jurisdiction to try it, but they were bound so to do. Had they refused, a mandamus would have lain to compel them to do so. This Court cannot inquire whether the decision on a point within their jurisdiction was correct or not: *Regina v. Bolton*, 1 Q. B. 66 (E. C. L. R. vol. 41). The order here is regular on the face of it; and, that being so, the Court will not look at the affidavits further than to see if there was jurisdiction. As to that, it may make it more clear to suppose the case reversed, and that the District Board had decided that the claimant was an officer, and that on appeal the Metropolitan Board had decided he was not an officer. Could it be said that this was not a decision within their jurisdiction, and therefore final? But, on principle, that supposed case and the present are identical.

**Lush and Taylor*, in support of the rule.—The facts were [*533 not disputed on the appeal; the decision was entirely on a mistake of the law. [Lord CAMPBELL, C. J.—Supposing it to be so, the court of appeal were to decide both on law and fact.]

Lord CAMPBELL, C. J.—I am of opinion that the certiorari ought not to have been granted, and that the rule to quash this order must be discharged. It is clear that the decision of the inferior tribunal, if on a point which they had jurisdiction to decide, is final. And it seems that, on well established principles quite consistent with all that was said in *Regina v. Bolton*, 1 Q. B. 66 (E. C. L. R. vol. 41), in this case the Metropolitan Board of Works had jurisdiction to decide whether the claimant had been an officer or not. It was an appeal which they were bound to hear. It was not a case in which their jurisdiction depended on a preliminary point; but, on the appeal being lodged, they had at once jurisdiction to dispose of it; and the question whether Defree was or was not an officer entitled to compensation was not a preliminary fact, but the very point which on the appeal they were to inquire into. Then, if they, having jurisdiction to inquire, did think that, *de jure*, he was an officer and entitled to compensation, their order by which they determined that he was so and awarded him compensation was within the Act, and not removable by certiorari.

COLERIDGE, J.—I am of the same opinion. The District Board had, I think, jurisdiction to inquire whether the claimant was or was not an officer; and, if so, a *multo fortiori*, the court of appeal had such jurisdiction. *The District Board in such a case might proceed on [*534 an erroneous ground, either in holding that the claimant was or that he was not an officer. Against their decision an appeal is given; and it would stultify the Act to say that it would not lie if their decision proceeded on such a ground. In *Regina v. Bolton*, 1 Q. B. 66 (E. C. L. R. vol. 41), the points discussed were with reference to courts in the first instance: this is the case of a court of appeal; and I think, in appeal, whatever might be the ground of a decision below must be within the jurisdiction of the court of appeal. The very ground of the decision of the Court in the first instance might be that the claimant was not an officer. Can it be said that if that decision were erroneous the court of appeal were bound to let it stand?

WIGHTMAN, J.—The District Board having rejected the claim for

compensation on the ground that the claimant was not an officer, he appeals. I am unwilling to proceed upon verbal distinctions; but I cannot help remarking that in this Act the terms are varied. "Every officer" may apply for compensation, but "any person making any such claim to compensation whose claim is rejected," may appeal. It seems to me that on appeal the inquiry would have to be on the very circumstance whether the claimant was an officer or not. The Metropolitan Board of Works were to hear such an appeal; and therefore their decision on that point was within their jurisdiction.

(ERLE, J., was absent.)

The rule was discharged, and the certiorari quashed.

*535] *The TAFF VALE Railway Company v. The Local Board of Health for the district of CARDIFF. Nov. 18.

The maintenance of the highways within the district of a local board of health must be provided for by a district rate, and not by a highway rate, whether the district be or be not co-terminous with an ancient parochial division.

NOTICE of appeal against a highway rate made by The Local Board of Health for the district of Cardiff having been given by The Taff Vale Railway Company, a case was stated for the opinion of this Court. By this it appeared that the municipal corporation of Cardiff are, by their council, Local Board of Health for the district of Cardiff, which is conterminous with the borough. The borough consists of two ecclesiastical districts; and one disputed point in this case was whether these two ecclesiastical districts formed separate parishes, or whether the whole district formed one parish for civil purposes. The evidence on this point was set out in the case. It is unnecessary to state more than that the Court thought that the whole district formed one parish for civil purposes. (a) The rate appealed against was made by the Local Board as surveyors for the highways of the district.

Bliss, in support of the rate.—If the district be composed of one parish only, the rate is good: *Hanson v. Epsom Local Board of Health*, 5 E. & B. 599 (E. C. L. R. vol. 85). It is otherwise if the district be not conterminous with one parish: *Moseley v. Ely Local Board of Health*, 6 E. & B. 518 (E. C. L. R. vol. 88): but *Hanson v. Epsom Local Board of Health*, 5 E. & B. 599 (E. C. L. R. vol. 85), was not overruled in that case.

Hugh Hill, contra.—The decision in *Hanson v. Epsom Local Board of Health*, 5 E. & B. 599 (E. C. L. R. vol. 85), is inconsistent with that in *Moseley v. Ely Local Board of Health*, 6 E. & B. 518 (E. C. L. R. vol. 88), and virtually overruled by it.

Lord CAMPBELL, C. J.—On examination of the whole reasoning in the judgment of this Court in *Moseley v. Ely Local Board of Health*, 6 E. & B. 518 (E. C. L. R. vol. 88), it shows that the necessity for making a district rate for the repair of the highways, and not a highway rate, is the same whether the district of the Board of Health be, or be

(a) The arguments and judgment are not reported, except so far as they relate to the point of law.

not, conterminous with the ancient parochial districts. We must adhere to that decision, and adjudicate that in this district there was no longer any power to levy a highway rate; the ways must be repaired out of funds raised by district rates.

COLERIDGE, J., and WIGHTMAN, J., concurred.

(ERLE, J., was absent.)

Rate quashed.

***Ex parte The Mayor, Aldermen and Burgesses of the Borough of LIVERPOOL. Nov. 19. [*537]**

Under The Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), justices ordered a party, against whom complaint was made by The Nuisances Removal Committee, for causing a nuisance, "to abate and discontinue the said nuisance, and to do such works and acts as are necessary to abate the said nuisance, so that the same shall no longer be a nuisance;" and, if the order were not complied with, the Committee were authorized to enter upon the premises, and do all such works, matters, or things as might be necessary for carrying the order into execution.

Held, that this was not an order for the execution of structural works, so as to be subject to appeal under sect. 16. And that therefore a penalty might be imposed for disobedience of the order, under sect. 14, notwithstanding the entry of an appeal against such order. And that, by sect. 39, the orders could not be brought up by certiorari.

Though it was deposed (upon application for a rule for certiorari and mandamus to compel the Sessions, under sect. 40, to hear the appeal) that the only proper and convenient mode of abating the nuisance was by constructing an underground drain of eight hundred feet in length.

By affidavit, produced in support of the application for the rule herein-mentioned, the following facts appeared.

On 10th January, 1857, an order was made, by two justices of the division of Kirkdale in Lancashire, upon The Mayor, aldermen and burgesses of the borough of Liverpool, on the complaint of Joseph Masker, an officer of the Bootle-cum-Linacre Nuisance Removal Committee, on behalf of that Committee. The order recited the complaint "that, in and upon certain premises situate at Bootle-cum-Linacre aforesaid, in the district, under The Nuisances Removal Act for England, 1855, of the complainants above named, the following nuisances then existed: that is to say, arising from sewage and filth flowing from the gaol of the said borough in Walton on the Hill, in the said county, through certain open ditches and watercourses in the said township of Bootle-cum-Linacre, and from accumulations and deposits of such sewage; and that the said nuisance is caused by the act and default of the said *Mayor, [*538] aldermen and burgesses of the said borough of Liverpool. And [538] whereas," &c. (appearance before the justices of the division, in petty sessions, on summons, and adjournment to the day of the order): "Now, upon proof having been laid before us that the nuisance so complained of doth exist, and that the same is caused by the act and default of the said Mayor, aldermen and burgesses, we, in pursuance of the said Act, do order the said Mayor, aldermen and burgesses, within three calendar months from the service of this order or a true copy thereof, according to the said Act, to abate and discontinue the said nuisance, and to do such works and acts as are necessary to abate the said nuisance, so that the same shall no longer be a nuisance; and, if the above order for abatement be not complied with, then we do authorize and require you, the

said Bootle Nuisances Removal Committee, from time to time, to enter upon the premises upon which the said nuisance has been proved to exist as aforesaid, and to do all such works, matters, and things as may be necessary for carrying this order into full execution, according to the Act aforesaid. And we do further order that, immediately on the service of this order, you, the said Mayor, aldermen and burgesses, do pay to William Statham and Edward Cotton, the solicitors to the said Bootle and Linacre Nuisances Removal Committee, the sum of 20*l.*, being the costs of the said Committee to the time of, and including, the making of the order."

The Corporation, at the Quarter Sessions held by adjournment in April, 1857, entered an appeal against this order; and the appeal was respited to the next Sessions, which were held by adjournment in July, *539] 1857; at which Sessions the appeal was called on. The counsel *for the respondents objected that the Sessions had no jurisdiction to hear the appeal: and the Court, after argument by counsel on each side, sustained the objection, and refused to hear the appeal.

The gaol mentioned in the order was situate wholly within the township of Walton in Lancashire, and no part within Bootle-cum-Linacre, or within the district of the Nuisance Committee above named. It was built by the Corporation in pursuance of the several statutes in that behalf, and, by resolution of the town council of 8th August, 1855, was duly declared to be the gaol of the borough.

Certain open ditches and watercourses, mentioned in the order as being in the township of Bootle-cum-Linacre, are in land on which the corporation have no authority to enter without the consent of the owners: and it was deposed, on belief, that the only proper and convenient mode by which the alleged nuisance could be abated was by the construction of an underground or covered drain or sewer of about eight hundred yards in length, wholly in Bootle-cum-Linacre, and on lands not under the control of the Corporation. The Corporation opened negotiations with the owners of the land through which the sewer or drain would pass, with a view to arrange for the construction thereof: and, in July, 1857, plans of the intended sewer were approved by the landowners: and contracts were obtained for the construction of the works, which were now in progress.

On 30th October, 1857, the justices in petty session, on the complaint of Joseph Masker, ordered the Corporation to pay 20*l.* costs and 50*l.* penalties for disobedience to the first-mentioned order.

*540] **C. Milward* now moved for a rule to show cause why a certiorari should not issue to bring up the two orders, and why a mandamus should not issue commanding the justices at Quarter Sessions to hear the appeal. The orders have been made under The Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121). By sects. 12 & 13 justices have power to order an abatement of the nuisance; and against a simple order for abatement no appeal is given. But sect. 16 gives an appeal against an order directing the execution of structural works; which appeal, by sect. 40, is to quarter sessions. This order appears to require the execution of structural works. The penalty imposed by the second order for disobedience of the first order is professedly made under sect. 14: but, by sect. 16, no penalty can arise, if the appeal be rightly brought, till the appeal is determined. Sect. 39

prohibits the certiorari to remove any of the proceedings under the Act: but, if the appeal lay, the second order would be without jurisdiction. So that the question is whether the first order was for the execution of structural works, or was merely a simple order for abatement. [Lord CAMPBELL, C. J.—It was clearly a simple order for abatement.]

Mellish, who was to have shown cause in the first instance, was not called upon.

Per CURIAM.(a)

Rule refused.

(a) Lord Campbell, C. J., Coleridge and Wightman, J.

*ANN BLACKWELL v. PHILIP NEWBERRY
ENGLAND. Nov. 20.

[*541]

The execution of a bill of sale was attested by a witness who signed as "W. R. C., clerk to Messrs. B. & R., Solicitors, Temple." It was in due time filed with an affidavit, which commenced "I, W. R. C., of King's Bench Walk, Inner Temple, in the city of London, clerk to Messrs. B. & R. of the same place, solicitors, make oath and say." In the body of the affidavit it was stated that the bill of sale was executed in the presence of the deponent; but there was no further description of the residence of the attesting witness. On the trial of a feigned issue to try whether the bill of sale was valid against an execution-creditor, it was proved that W. R. C. was clerk to the solicitors, whose office was in King's Bench Walk, that all his business hours were passed there, and that it was the place where he would be most readily heard of, but that he took his meals and slept elsewhere.

Held, that the description of the residence was sufficient to satisfy the requirements of stat. 17 & 18 Vict. c. 38, s. 1.

FEIGNED issue to try whether certain goods, seized by the sheriff under a fi. fa. issued at the suit of the defendant against Robert Harvey, were, at the time of the delivery of the writ to the sheriff, the property of the plaintiff.

On the trial, before Erle, J., at the Middlesex Sittings in this Term, it appeared that the goods in question were bonâ fide assigned by Harvey to the plaintiff by a bill of sale, dated 17th April, 1857. The deed was attested in the following form. "Signed, sealed, and delivered by the above-named Robert Harvey (the words 'on demand' being first interlined in the second line of the second page hereof) in the presence of W. R. Cuthbert, clerk to Messrs. Brundrett & Randall, Solicitors, Temple." A copy of the bill of sale, along with an affidavit, was filed on the 18th April, 1857. The affidavit commenced: "I, William Robert Cuthbert, of King's Bench Walk, Inner Temple, in the city of London, clerk to Messieurs Brundrett & Randall of the same place, solicitors, make oath and say." The affidavit then stated that the copy of the bill of sale annexed was a true *copy; that the bill of sale was [*542 executed on the 17th April, 1857, in the presence of the deponent; and it gave the residence and occupation of Harvey: but there was no further description of the residence or occupation of the attesting witness than was contained in the heading of the affidavit. Evidence was given that the bill of sale was bonâ fide executed for value and attested by Cuthbert; and that he was clerk to the solicitors named, at whose chambers in King's Bench Walk he passed all the business hours of his life, which was the place where he was most likely to be found by any one inquiring for him; but that he neither slept nor

took his meals there. The learned Judge directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendant if the description of the residence of the attesting witness was, under those circumstances, insufficient to satisfy the requirements of stat. 17 & 18 Vict. c. 36, s. 1.

C. Milward now moved for a rule Nisi pursuant to the leave reserved.—Stat. 17 & 18 Vict. c. 36, s. 1, makes void bills of sale, unless, amongst other things, “a description of the residence and occupation” of every attesting witness to it be filed. The Court of Exchequer have construed this Act strictly: *Allen v. Thompson*, 1 H. & N. 15.† The precise question has been raised, but not yet decided, in that Court on an interpleader rule, on which the Court has taken time to consider, in a case of *Attenborough v. Thompson*.(a) There are many decisions on the meaning of the word residence in other statutes. In the Reform Act (2 & 3 W. 4, c. 45, s. 27) it has been construed to mean the home, *543] the place where the family are: *Whithorn v. Thomas*, 7 M. & G. 1 (E. C. L. R. vol. 49). Stat. 3 & 4 W. 4, c. 42, s. 8, requires that a plea in abatement for non-joinder shall be accompanied by an affidavit of “the place of residence” of the party. That also has been held to mean “domicile or home:” per Parke, B., in *Lambe v. Smythe*, 15 M. & W. 433.† It is clear that a solicitor’s chambers are not his clerk’s “home or domicile,” but at most his place of business. His place of business is not his residence: *Maybury v. Mudie*, 5 Com. B. 283 (E. C. L. R. vol. 57). So, under the poor law, the inhabitants liable to be rated as such are the residents. “I take it,” says Bayley, J., “that that word” (resides), “where there is nothing to show that it is used in a more extensive sense, denotes the place where an individual eats, drinks, and sleeps, or where his family or his servants eat, drink, and sleep:” *Rex v. North Curry*, 4 B. & C. 953, 959 (E. C. L. R. vol. 10). [WIGHTMAN, J., referred to *Ablett v. Basham*, 5 E. & B. 1019 (E. C. L. R. vol. 85).]

Lord CAMPBELL, C. J.—In general, on a point on which a Court of co-ordinate jurisdiction had taken time to consider, we should not refuse a rule; but in this case we have had a conference with the Barons of the Exchequer, the result of which shows that we may do so without any disrespect to them. Mr. *Milward* has ably brought before us all authorities and arguments which could be urged in favour of his position. Having heard them all, I am clearly of opinion that it is untenable. The meaning of words used in a particular Act is to be ascertained by seeing what was the object of the Legislature in that Act, and the *544] means by which that object was to be attained. There are enactments concerning residence where the object of the Legislature will not be attained unless the word be taken to mean the place where the person dwells with his family. That is so where the object is to regulate the franchise. So when the object was, as in stat. 3 & 4 W. 4, c. 42, s. 8, to give the place where process might be served, the word was construed with reference to that object. But this Court held, in *Ablett v. Basham*, 5 E. & B. 1019 (E. C. L. R. vol. 85), that it was enough if the plaintiff, suing in person, endorsed on the writ his place of business, because the object of The Common Law Procedure Act,

(a) See the case 2 H. & N. 559.†

1852, requiring an endorsement of the plaintiff's residence on the writ, was to secure information better given by the place of business than by that of rest. And I am of opinion that in this Act also the object of the Legislature is better attained by giving, as the description of the residence of a solicitor's clerk, the office where he attends all the day than if it gave the place where he passes the night. If the object of the Legislature was to secure means of identifying and tracing the attesting witness, this is the description which best fulfils that object; and such I think was the object of the Legislature when it required a statement of his residence and occupation. For this purpose his residence is the place where he is most likely to be found. If we were to hold that bills of sale could be set aside on such grounds, we should render the Act passed with a view of preventing frauds a means of effectuating them.

COLERIDGE, J.—This Act requires a description of *the “residence and occupation” of every attesting witness; and here is [545 the affidavit: the attesting witness describes himself as of King's Bench Walk, clerk to Messrs. Brundrett & Randall of the same place, solicitors. It appears that he was clerk there, and was to be found there during business hours, but slept and took his meals elsewhere. The question is, not whether this was the only residence which would satisfy the requirements of the statute, but whether it was a residence sufficient. I assent to the argument that, in construing the statute, we must look to convenience: but I think that that makes against Mr. *Milward*; for, of all possible descriptions of the witness's residence, that which has been adopted seems to me the most convenient. Had the clerk described himself as of the house where at the time he slept, perhaps giving some obscure temporary lodging, it would not have given anything like the same facility for tracing him that this description gives; for there he is to be found at all business hours. It is said, however, that residence is a word having a definite technical meaning, and that, when used in an Act of Parliament, we must give it that meaning. But I think that it has not any definite technical meaning, and that the word varies in its construction according to the object for which the residence is required. In one set of Acts, the object is to ascertain the settlement of a pauper; there he resides where his head lies at night. In another class of Acts the object is to ascertain the jurisdiction of the Court; with reference to that object domicile may be important. But, unless the cases on such Acts decide that the word “residence” always imports the domicile, they do not bear on the present case. And, as I think *that [546 they do not establish that the word has such a technical sense, I construe it as used in this Act with reference to its object, and think the description here sufficient.

WIGHTMAN, J.—It is always important to consider what is the object of an Act requiring a statement of a residence. In several cases it would not be sufficient to give the place of business; that would be so wherever it appeared that the intention of the Legislature was to require the place of abode of the family. But in this Act the object of the Legislature was to secure a description by which the attesting witness might most readily be found. I know of no description of an attorney's clerk better fitted for that purpose than describing him of his master's place of business, where the clerk is to be found all day long. It is far better calculated for the end in view than a description of a lodging

where he merely passes the night. The case is not without analogy; for in *Ablett v. Masham*, 5 E. & B. 1019 (E. C. L. R. vol. 85), it was held that the place of business of an attorney issuing a writ in person was his residence within the meaning of The Common Law Procedure Act, 1852. That authority seems to me in point.

ERLE, J.—The question is, Whether the enactment which requires a description of the residence and occupation of every attesting witness to a bill of sale to be given, has been complied with: it being proved that the place given as the residence of this witness is the place where he *547] passed all the active hours of his life, *but is not the place where he slept. “Residence” is a word capable of bearing several meanings. Whenever a word, so capable, is found in an Act of Parliament, we look at the object of the Legislature in order to ascertain what meaning the word, when so used, was intended to bear. The Act (17 & 18 Vict. c. 36) was intended to prevent secret frauds by means of bills of sale. The object of the enactment in question was to enable the party who suspected a secret fraud to trace the witness and so make inquiry. For this purpose his residence is to be given. Which meaning given to the word will best effectuate that object? I hold it to be impossible for any one whose mind is not perverted by too much technical knowledge to doubt that the purpose is better effectuated by giving the place where the witness passes all his active hours, the place of business, than by giving the place of pernocation. Where the object is different, the meaning of the word may be different. I believe if antiquarian research were made it would be found that in old times, when the hundred was responsible for those who became inhabitants, the definition of those who were residents and suitors to the Court leet turned upon that; and, with reference to that idea, pernocation was material. So in settlement cases: the beginning of a settlement was when the inhabitants had notice that the party intended to abide with them as an inhabitant. For that purpose his sleeping in the parish was most important. In that branch of law therefore pernocation is the test of residence. But that is a very narrow ground of construction, confined to the poor law: and it would be perverting other Acts as to residence if we held that construction applicable to them. None of the cases cited bear out *548] such a rule of construction in Acts other *than the Poor Law Acts. In *Lamb v. Smythe*, 15 M. & W. 433,† the decision was that the house of Sir George Rich, where he did not at the time live, but which was his home or domicile, was his residence; but it by no means follows that no other place could be his residence. In *Maybury v. Mudie*, 5 Com. B. 283 (E. C. L. R. vol. 57), the attorney for the defendant was deceived by the plaintiff as to the place of abode of the co-contractor, and gave, in the affidavit verifying a plea in abatement, what was held not to be the residence. But the reason given was that the object of the Act requiring an affidavit of the residence of the co-contractor was to enable the plaintiff to issue a better writ, and therefore for that object required the affidavit to give as the residence the place where the plaintiff must apply before he could obtain a distringas to compel an appearance. For that purpose the place of business, according to the practice of the Common Pleas in that matter, would not do. Maule, J., gives that as the reason: “An attempt to serve him with process at that place, would not enable the plaintiff to obtain a distringas.

The plea, therefore, is not accompanied with such an affidavit as the statute has made a condition precedent to its validity." The reason has ceased; but such was the reason of the decision. There is therefore no authority against the principle on which we now act: whilst in *Ablett v. Masham*, 5 E. & B. 1019 (E. C. L. R. vol. 85), it was held that the directions of The Common Law Procedure Act, 1852, requiring the abode of the attorney who issues a writ of summons to be endorsed on it, are complied with if he endorses on it his place of business. That was the express decision of the whole Court of Queen's Bench (except myself), and was on an enactment of a nature to require [*549 more precision in complying with it than this. I am happy to say that the sound principle of common sense on which we decide in construing this Act is no novelty. In *Haslope v. Thorne*, 1 M. & S. 103 (E. C. L. R. vol. 28), Lord Ellenborough "said that the words 'place of abode' did not necessarily mean the place where the defendant sleeps; that the object of the rule of Court was to ascertain the place where the deponent was most usually to be found, which in the present case was the office at which he was employed during the greater part of the day, and not the place whither he returned for the purposes of rest." The rule of construction is the same whether it be a rule of Court or an Act of Parliament. We are to look at the object, and to construe ambiguous phrases in the sense that will further that object, not in the sense that will frustrate it.(a) Rule refused.

(a) See *Heydon's Case*, 3 Rep. 7 b. "And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:—1st. What was the common law before the making of the Act. 2d. What was the mischief and defect for which the common law did not provide. 3d. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

*The QUEEN v. ARNOULD, DALZELL, and WAKE-FIELD. Nov. 21. [*550

The QUEEN v. ARNOULD, DALZELL, and BULLOCK.

Under stat. 5 & 6 W. 4, c. 50, s. 95, if a party charged before magistrates with liability to repair a highway which is out of repair deny the liability, the magistrates must direct an indictment to be preferred. They have no discretion as to this: and, if they refuse, a mandamus will be issued commanding them to make the order.

Although evidence was tendered, before the magistrate, to show that the alleged highway was set out under an enclosure act, and had not been declared, in compliance with stat. 41 G. 3 (U. K.) c. 109, s. 9, to be complete; and although the same facts are deposed to in answer to the application for the mandamus.

CRIPPS, in last Term, obtained a rule calling on Joseph Arnould and John Dalzell, Esquires, two justices of Berkshire, and Edward Wakefield, surveyor of the highways for the liberty of East Hagbourn in Berkshire, to show cause why the said two justices should not sign and perfect an order made by them, at the adjourned special sessions of the

highways, on 1st May last, upon the complaint of William Wignall, for an indictment to be preferred, and the necessary witnesses in support thereof to be subpoenaed, at the next assizes to be holden in and for the said county, against the inhabitants of the said liberty, or the party to be named in the said order, for suffering and permitting a certain highway within the said liberty to be out of repair.

Cripps also, in the same Term, obtained a similar rule, on the same justices and on John Bullock, surveyor of the highways of the liberty of West Hagbourn, for an indictment against the inhabitants of the liberty of West Hagbourn.

The following facts appeared upon the affidavits in support of the rules.

*551] On 24th April, 1857, the two surveyors, Wakefield *and Bullock, appeared before the two justices at petty sessions, upon summonses issued upon the complaint of Wignall, in respect of the non-repair of roads lying respectively in the two liberties. The surveyors asked for an adjournment, in order that they might confer with their respective parishioners, and be prepared to admit or deny the liability to repair. The case was adjourned to 1st May; when the surveyors again appeared. The surveyor for West Hagbourn denied the liability. Wignall then applied for an order under sect. 95 of the General Highway Act, 5 & 6 W. 4, c. 50, directing an indictment to be preferred and the necessary witnesses to be subpoenaed at the next assizes. Dr. Arnould then said that the justices directed an indictment to be preferred against the inhabitants of West Hagbourn. Afterwards the surveyor for East Hagbourn also denied the liability: and the justices directed a similar order to be made as in the preceding case. The clerk to the justices then said that the orders should be drawn up and signed at once, and forwarded to Wignall's attorney. The attorney, the orders not having been sent, made repeated applications for them: and, on 29th May, he received a letter of that date from the clerk of the peace, stating that the parish of East Hagbourn alleged that, although the road was a highway, the parish was "not bound to repair it, on account of there having been no certificate under the Enclosure Act; and that it is, in fact, a highway to repair which no person or body is liable." That the justices were now of opinion that this was the true view of the case, and that they ought not to make any order, either for convicting the surveyor or indicting the road. The letter added *552] that the justices could not "help *reverting to their having been denied, by the prosecutor's counsel, the right they so strongly contended for, of examining the witnesses, and inquiring into the case." The affidavits denied that there had been such contention by the justices, or such denial of right by the prosecutor's counsel. Afterwards, each of the justices, upon personal application, refused to sign the orders, assigning the same reason; namely, that they had been wrong in deciding upon the question without receiving evidence as to the liability of the parishes to repair.

In answer, it was deposed that East Hagbourn was a parish, not a liberty. That, on 24th April, the prosecutor's counsel had stated to the justices that they had simply to act ministerially, and not judicially, under sects. 94, 95, and had no discretion. That, on 1st May, the surveyor of East Hagbourn stated that the road was set out by the com-

missioners under the Enclosure Act, and was not certified by justices, and offered evidence of this. That the prosecutor's counsel objected, and stated that the justices could not act judicially but only ministerially, and pointed out to the surveyor that it was advisable for him to deny his liability; for that the other alternative could only lead to a conviction, as the justices would then be bound to appoint a viewer, or view themselves, and, if the road was out of repair, must convict; and that the surveyor could not in that case deny his liability afterwards. Dr. Arnould remarked on the absurdity of justices convicting in cases where they were precluded from ascertaining the facts: but the expression of the opinion of the prosecutor's counsel prevailed; and no evidence was allowed to be given on either side: and the surveyor finally denied the liability. The clerk to the justices deposed that he had only *promised to send a draft of the orders to Wignall's attorney; [*553 and that, afterwards, the said clerk, upon consulting an authority which he stated, came to the opinion that the order ought not to be granted, which opinion he communicated to the justices. There were also depositions to the effect that the roads, so far as they were highways at all, were set out by awards under stat. 6 & 7 W. 4, c. 115, enrolled (a) in the office of the clerk of the peace for Berkshire: and that there was no certificate of the completion of the roads. That in fact the roads had never been made and completed.

Sir *F. Theiger* and *J. Gray* now showed cause.—This rule has been obtained on the assumption that the magistrates had no discretion, but were bound to act under sect. 95 of stat. 5 & 6 W. 4, c. 50, the liability to repair being denied. Now, under the General Enclosure Act, 41 G. 3 (U. K.), c. 109, s. 9, the inhabitants (except as far as regards statute duty) “shall be in no wise charged or chargeable towards paving or repairing” the roads set out under an enclosure “till such time as the same shall, by such justices in their special sessions, be declared to be fully and sufficiently formed, completed, and repaired, from which time, and for ever thereafter, the same shall be supported and kept in repair by such persons, and in like manner as the other public roads within such parish, township, or place, are by law to be amended and kept in repair.” The roads have been set out; but there has been no declaration at special sessions that they have been sufficiently formed: and a road, whether made or continued under an enclosure award, must be declared to be complete *before the inhabitants are bound to repair: *Rex v. Hatfield*, 4 A. & E. 156 (E. C. L. R. vol. 31). This [*554 was also taken for granted in *Regina v. Midville*, 4 Q. B. 240, (E. C. L. R. vol. 45). It seems a very harsh construction of sect. 95 to treat the justices as bound to order an indictment in so clear a case of non-liability; the more so, as under that section the parish has to pay the expenses, even where the liability is disproved by its being shown that another party is liable *ratione tenuræ*: *Regina v. Justices of Surrey*, 1 Bail Court Ca. 70. The words of sect. 94 are equally peremptory with those of sect. 95; and yet, under sect. 94, the magistrates are not bound to act upon the report of the viewer, but should exercise their own judgment: *Regina v. The Justices of Wilts*, 8 Dow. P. C. 717. The sound construction of both the sections appears to be that they relate only to what

(a) Sect. 51: and see stat. 41 G. 3 (U. K.) c. 109, s. 35.

are undoubtedly legal roads, as to which the only question is what party is liable to the repair. [COLERIDGE, J.—Recollect that the proceeding by indictment, under sect. 95, is merely substituted for the old method of presentment. Do the justices, by ordering the indictment, finally decide that the alleged highway is an highway?] Not finally, certainly; but they do so for the purpose of sending the case to trial. Their duty, however, would seem to be somewhat analogous to that under the Malicious Trespass Act, 1 G. 4, c. 56, s. 6, where they are to abstain from proceeding if there be a bonâ fide claim of right, but must exercise their judgment on the question whether there be such bonâ fide claim. The summons, in sect. 95 of stat. 5 & 6 W. 4, c. 50, on which the justices are called upon to act, appears, by sect. 94, to be a summons against the party “chargeable with such repairs:” “chargeable” *555] must mean more “than “charged.” [WIGHTMAN, J.—Must the magistrate ascertain who is chargeable before he issues the summons? COLERIDGE, J.—According to your argument, the magistrates would have to decide the question whether the party is liable or not.] Only to the extent of determining whether there should be an indictment at the expense of the parish. They must ascertain whether there really is a question to be tried. [Lord CAMPBELL, C. J.—They have a discretion to determine against what party the indictment shall be preferred: I cannot see that they have any other.] The result would seem then to be that the section admits of no construction not leading to an absurdity. But that the language of it is to be construed with some limitation appears from this, that, if on the trial it turns out that the alleged highway is not an highway, their jurisdiction is held to have failed, so that an order upon the indicted parish to pay the costs is void: *Regina v. Heanor*, 6 Q. B. 745 (E. C. L. R. vol. 51). (a)

Bliss and Cripps, contra, were not called on to support the rule.

Lord CAMPBELL, C. J.—The magistrates were bound to proceed. Sect. 95 leaves them no discretion, except as to whether the indictment shall be against the parish or some other party.

COLERIDGE, J.—I am of the same opinion. I really do not think that there is any ground whatever for objecting to the rules. Sect. 94 begins by enacting that, when information is given that a highway is out of *556] *repair, the justices are to issue the summons: that is, the summons must go upon the statement that a place called a highway is out of repair. Who is to be summoned? “The surveyor of the parish, or other person or body politic or corporate chargeable with such repairs.” The magistrate, therefore, must summon the party charged with the liability, whatever be his own knowledge on the point. Then, if the only question be as to the state of repair, the justices are either to appoint a viewer, or to view themselves: if they are satisfied, by either of those means, that the highway is out of repair, they are to fine the party and order him to repair. But a proviso at the end of the section directs that there shall be no power to make the order if the liability comes in question. That case is provided for by sect. 95. Upon that section, the question arises:—This highway being out of repair, do you or do you not admit your liability? If it is not admitted, the magistrates have to order an indictment: and this proceeding is only a sub-

(a) See *Regina v. Hickling*, 7 Q. B. p. 889, note (a).

stitute for the method previously practised of bringing a case before a jury upon a presentment. Then the statute says that the costs of the prosecution are to be paid out of the parish highway-rate: there is no enactment that the costs of the defendant are to be so paid if the parish succeeds. Here, however, comes in the decision in *Regina v. Heanor*, 6 Q. B. 745 (E. C. L. R. vol. 51), which, rightly or wrongly, establishes that the costs of the prosecution are not to be paid out of the parish highway-rate where it turns out that the alleged highway is not a highway.

WIGHTMAN, J.—I am of the same opinion. If *information on oath is given to a justice that a highway is out of repair, he is to summon the party liable to repair. *Primâ facie*, that party is the parish: whether the parish or another person, sect. 95 applies: if the party charged denies the liability, the magistrates are then required to direct an indictment: the words are too strong to admit of doubt. It is said that the magistrates have a discretion to inquire whether there is a liability: and it may be that it would be better if they had power to make such a provisional inquiry.

(ERLE, J., was absent.)

Rules absolute.

The QUEEN v. The Justices of LEICESTERSHIRE. Nov. 23.

Under sects. 44, 105, of stat. 5 & 6 W. 4, c. 50, no appeal lies, on the part of the surveyor of the highways, against an order of justices at highway sessions allowing part of his accounts and disallowing the rest, and ordering him to pay over to his successor the amount disallowed.

HUDDLESTON, in this Term, obtained a rule calling on the justices of Leicestershire to show cause why a mandamus should not issue, commanding them to enter continuances to the next general quarter sessions, upon the appeal of Thomas Pougher Greenway against an original order of the Rev. Jones Powell Marriott, clerk, and David Richard Jones, Esq., two of the said justices, relating to the accounts of the said T. P. Greenway as surveyor of the highways of the parish of Broughton Astley, for the year ending 31st day of March last; and at such next general quarter sessions to hear and determine the merits of the said appeal.

It appeared from the affidavits that Greenway, after *the termination of his office of surveyor of the highways for the parish of Broughton Astley in Leicestershire, laid before the parishioners in vestry his accounts; in which he stated his receipts to be 334*l.* 0*s.* 11½*d.*, and his expenditure 342*l.* 12*s.* 4½*d.*, leaving a balance in his favour of 8*l.* 11*s.* 5½*d.* He afterwards attended before two justices, at a special highway sessions, for the purpose of verifying his accounts. Four inhabitant rate-payers appeared to oppose the allowance; and the justices finally allowed the accounts, except as to 80*l.* 15*s.* 2*d.* of the expenditure, which they disallowed: and they ordered the balance, 72*l.* 3*s.* 8½*d.*, to be paid to the succeeding surveyor.

Greenway gave, to the justices and the opposing parishioners, notice of appeal to quarter sessions on the following grounds.

"First. That I am aggrieved by the said order, judgment, and determination.

"Secondly. That the said order, judgment, and determination was not made or founded upon any proper or sufficient complaint.

"Thirdly. That the said order, judgment, or determination was not founded upon legal or proper evidence.

"Fourthly. That the said several sums amounting together to the said sum of 80*l.* 15*s.* 2*d.* were bonâ fide and properly laid out and expended by me in, upon, and about the highways of the said parish of Broughton Astley, and ought not, nor ought any of them, to have been disallowed as aforesaid.

"Fifthly. That the said several sums amounting together to the said sum of 80*l.* 15*s.* 2*d.* ought not, nor ought any of them, to have been disallowed as aforesaid.

*559] "Sixthly. That the said order, judgment, or determination is bad, defective, uncertain, and insufficient on the face thereof."

The appeal was entered, and was called on at the Leicestershire Quarter Sessions holden on 29th June, 1857. The respondents objected that there was no jurisdiction to try the appeal: and the Sessions, holding this objection good, refused to hear.

Hayes, Serjt. (with whom was *C. G. Merewether*), now showed cause. —Sect. 44 of stat. 5 & 6 W. 4, c. 50, authorizes the rate-payers to object to the surveyor's accounts before the justices in the highway sessions, at the time of the verification: but no appeal is given from the decision of such justices: they are "to make such order thereon as to them shall seem meet." By sect. 45 the highway sessions for verification of the accounts are to be held within fourteen days after 25th (misprinted 20th) March. By sect. 105, "if any person shall think himself aggrieved by any rate made under or in pursuance of this Act, or by any order, conviction, judgment, or determination made, or by any matter or thing done, by any justice or other person in pursuance of this Act, and for which no particular method of relief hath been already appointed, such person may appeal to the justices at the next general or quarter sessions of the peace." This is not a case under which no particular method of relief is appointed: the relief is given by the investigation at the highway sessions. It has been decided that no appeal lies against the allowance of the surveyor's accounts: *Regina v. The Justices of the West Riding*, 1 Q. B. 624 (E. *560] *C. L. R.* vol. 41), *a decision which agrees with that in *Rex v. The Justices of the West Riding of Yorkshire*, 5 T. R. 629, (a) on the analogous sections, 48 and 80, of the old Highway Act, 13 G. 3, c. 78. Now there can be no distinction, as to this, between the allowance and the disallowance of the accounts: in truth what has taken place here is an allowance, though not an allowance of the whole of the surveyor's claim to credit. The justices in highway sessions have to verify the accounts on their own authority. If the justices could be brought before the quarter sessions by the surveyor, why not by the parishioners? It was intended that the proceeding at the highway sessions should be final, the question being one of account. [COLERIDGE, J.—If the justices allow one of two disputed items, but disallow the other, it seems strange to say that the surveyor can appeal but the parishioners cannot.] There can be no such distinction. [ERLE, J.—Who are to be the respondents? Sect. 105 directs notice to be given to the surveyor, the justices, and

the persons whose act is complained of. There is no provision for notice to parishioners. It seems scarcely consistent with justice to give a discretionary power, and then to put those to whom this power is given to the expense of becoming respondents on an appeal.] The probability that the Legislature meant the proceeding at the highway sessions to be conclusive is increased by the circumstance that the surveyor may be there examined; but this could not be done at quarter sessions. (He was then stopped by the Court.)

Huddleston and T. Bell, contrà.—The objection that *the [*561 notice of appeal must be given to the magistrates would apply in every case of an appeal against a conviction. [ERLE, J.—But there is in this case no provision for notice to the parishioners.] Other cases exist in which the notice is only to the magistrate whose decision is appealed against. The surveyor, under sect. 44, has no notice that objections are to be made to his accounts. [ERLE, J.—The justices can adjourn the case. WIGHTMAN, J.—The surveyor comes prepared with vouchers.] Under sect. 42 of stat. 5 & 6 W. 4, c. 50, he is liable to a fine in double the amount of the sum not accounted for. The disallowance does not stand on the same footing as the allowance. The allowance is within the exception in sect. 105; the parishioners can carry their complaint against the accounts to the justices in highway sessions: but this is inapplicable to the case of the surveyor, who has nothing to complain of till the justices in highway sessions have decided. [WIGHTMAN, J.—Do you say that the surveyor could be a witness at quarter sessions?] Perhaps not, under the old law, according to the principle of *Rex v. Woburn*, 10 East 395.

Lord CAMPBELL, C. J.—It has been expressly decided that no appeal lies against the allowance of the surveyor's accounts at the highway sessions. Mr. *Huddleston* insists upon a distinction between an appeal by the parishioners and an appeal by the surveyor. It would be very odd if the enactment distinguished between the two. Mr. *Huddleston* says that in the case of the surveyor no particular mode of relief appears to have been given, so *as to bring the case within the exception of sect. 105: and he would succeed if he could show [*562 that any relief was given to the parishioners which is not given to the surveyor: and it was with a view to the consideration of this point that the rule was granted. We cannot see that there is any distinction as to the way in which the two are spoken of: but, even if the expression were equivocal, we should be bound to look at the reason of the thing; and it would be manifestly absurd to lay down one rule in the case of the allowance of the accounts and another in the case of the disallowance.

COLERIDGE, J.—I am of the same opinion. In fact Mr. *Huddleston* is disputing the decision of *Regina v. The Justices of the West Riding*, 1 Q. B. 624 (E. C. L. R. vol. 41). If the question were new it might be open to argument: but, supposing that decision to be right, it is absurd to hold that there is an appeal for the surveyor and not for the parishioners. The parishioners never come before any tribunal till the highway sessions, which are held at least eight times a year: then they come before that tribunal; and so does the surveyor: it would be an absurdity to hold that the parishioners were bound by this, and not the surveyor.

WIGHTMAN, J.—It has been decided that the parishioners have no right to appeal; and I think that, a fortiori, the surveyor has none. By sect. 105 the only parties to whom notice of appeal is to be given are the justices, the surveyor, and the persons whose act is complained of: there is no provision for giving notice to the parishioners.

*563] *ERLE, J.—It is clear, from the cases, that the decision of the highway sessions is final when it is against the parishioners who have objected to the accounts. Still it is said that such a decision, if it is against the surveyor, is only preliminary. I cannot see that the Legislature has made it final in the one case and not in the other: and I think we ought to treat it as final in the case both of allowance and of disallowance.

Rule discharged.

The QUEEN v. The Justices of LANCASHIRE. Nov. 23.

Under sect. 83 of stat. 5 & 6 W. 4, c. 50, an appeal against a certificate of justices for stopping a highway cannot be brought unless ten days' notice has been given before the Quarter Sessions held next after the expiration of four weeks from the lodging of the certificate with the clerk of the peace.

Where the Sessions had entered and respited an appeal, of which such notice had not been given, this Court quashed the order of Sessions on certiorari.

Where the General Quarter Sessions commences on a certain day, and is in practice afterwards adjourned and held on another day in another place, for the purpose of deciding matters in its vicinity, the notice of appeal must be given ten days before the day first mentioned, though the highway is in the vicinity of the latter place.

MONK, in this Term, obtained a rule calling on The Justices for Lancashire to show cause why a writ of certiorari should not issue, to remove into this Court an order of the Court of general quarter sessions for the said county, held at Lancaster on 29th June last, and, by adjournment, at Salford on 6th day of July last, whereby an appeal of William Greenwood and others against the application of one Thomas Scholfield and another for an order for stopping up entirely, as unnecessary, part of the public footway called Rise Lane, situate within the hamlet of Todmorden in the division of Middleton in the county of Lancaster, was respited to the then next General Quarter Sessions of the peace *for the same county, and also an order of the General *564] Quarter Sessions for the same county, held at Lancaster on 19th October last, and, by adjournment, at Salford on 29th of the same month, whereby the same appeal was further respited; and why the same orders respectively should not be set aside, as being made without jurisdiction.

The following facts appeared upon affidavit. Two justices of the county, on 28th May, 1857, certified, on the application of the surveyors of the hamlet (maintaining its own highways and having its own surveyors), that the footway was proposed to be entirely stopped up, and that it was and is unnecessary. The certificate was, on 29th May, 1857, lodged with the clerk of the peace of the county of Lancashire, in which the footway was situate. On 24th June, William Greenwood and others served on the surveyors notice of appeal against the certificate to the then next general quarter sessions, to be holden for the county of Lancashire by adjournment at Salford, in the said county, together with

a statement of grounds of appeal. The next general quarter sessions were held at Lancaster on 29th June, and, by adjournment, at Preston on 1st July, and, by adjournment, at Salford on 6th July. No quarter sessions are held for any particular limit in which the said highway is situate, unless the general quarter sessions for the whole county so held by adjournment at Salford can be considered as held for any particular limit.

On 6th July, the first day of the sessions held by adjournment at Salford, the surveyor applied for an order to stop the highway: but the Court did not entertain the motion, on account of the alleged notice of appeal, the third day of the adjourned sessions being *the day [*565 for the hearing of appeals, according to the practice there. On 8th July, the appellants appeared in support of the appeal: but the surveyors objected that the notice was insufficient. The Court held that the notice was not sufficient, ten days' notice of appeal not having been given, and that the appellants could not be heard at those sessions. Upon this the appellants applied to have the appeal adjourned until the next sessions: but the surveyors contended that there was no existing appeal that could be adjourned, but that, if there was any such appeal, it ought to be dismissed, there being no power to adjourn: and they again applied for an order to stop up the highway. The Court adjourned the appeal to the next General Quarter Sessions, to be held by adjournment at Salford, and made the following special entry. "In this case it was proved that notice of appeal was given within ten days before the commencement of the Sessions. Ordered, notwithstanding ten days' notice of appeal was not given pursuant to the statute 5 & 6 W. 4, c. 50, that the appeal be adjourned to the next quarter sessions on payment of costs of the day by the appellants. The certificate having been read, an application was made on behalf of the respondents that the Court should make an order under the 91st sect. of the statute 5 & 6 W. 4, c. 50, for stopping up the highway mentioned in the certificate. The application was refused to be entertained, the Court having adjourned the appeal."

The surveyors did not act upon the order, nor demand or receive the costs, or present any bill for the same.

At the October sessions, the appeal was, at the instance of the appellants, respited to the next January sessions.

* *Welsby* and *Sowler* now showed cause.—The proceedings here have been taken under sect. 85 of stat. 5 & 6 W. 4, c. 50. The [*566 notice of appeal, by sect. 88, should be a ten days' notice in writing: if the Sessions holden at Salford can be considered as an original Sessions, being for a distinct division of the county, there was a ten days' notice. [Lord CAMPBELL, C. J.—Has the Court ever noticed these divisions?] Sect. 85 seems to point to something of the sort. But, at any rate, the Sessions had power to adjourn. The restriction, as to the notice, in sect. 88, is "that it shall not be lawful for the appellant to be heard in support of such appeal unless such notice and statement shall have been given as aforesaid," &c. This does not preclude the Sessions from entertaining the appeal, so far as to respite without hearing. *Rex v. Kimbolton*, 6 A. & E. 603 (E. C. L. R. vol. 83), is in point. There, on the supposition that there had been no good service of the statement of grounds of appeal, it was held that the Sessions might, under their

general power as a Court, receive and respite the appeal. [Lord CAMPBELL, C. J., referred to *Bowman v. Blyth*, 7 E. & B. 26, in Q. B.(a)] There this Court, though deciding against the power of the Sessions to adjourn, under the circumstances, the settling of the amount of fees, expressly recognised the general power.(b) The same principle was upheld in *Re Blues*, 5 E. & B. 291 (E. C. L. R. vol. 85), and applied to a notice of appeal against a conviction, under stat. 6 G. 4, c. 129, s. 3, of endeavouring by threats to force a workman to depart from his hiring. [ERLE, J.—I think we have, on several occasions, founded our decisions *567] as to the practice of respiting on *the inveterate construction put upon the poor-rate removal and poor-rate Acts, 9 G. 1, c. 7, s. 8, and 17 G. 2, c. 38, s. 4.] That was said in *Regina v. Eyre*, 6 E. & B. 992 (E. C. L. R. vol. 88).(c) The question there was, whether the sessions is bound to respite. But *Rex v. Kimbolton* was a decision upholding the discretion of that Court under The Poor Law Amendment Act, 4 & 5 W. 4, c. 76, s. 81. [Lord CAMPBELL, C. J.—The cases cited appear to resemble the present very nearly. We should like to hear how the counsel on the other side propose to distinguish them.]

Monk (with whom was *R. Assheton Cross*), in support of the rule.—In *Rex v. Kimbolton* the Court of sessions was rightly seised of the appeal; the serving the statement of grounds of appeal was not, under stat. 4 & 5 W. 4, c. 76, s. 81, a condition precedent to appealing. No doubt, when the Court has once possession of the appeal, it has a general power of dealing with the case. Stat. 9 G. 1, c. 7, s. 8, expressly enacts, in the case of an appeal against an order of removal, that there shall be an adjournment if the Court think that reasonable notice has not been given. So does stat. 17 G. 2, c. 38, s. 4, in the case of an appeal against a poor-rate. The cases under those statutes are therefore inapplicable. An appeal is the creature of statute: in stat. 5 & 6 W. 4, c. 50, it is created by sect. 88, which merely authorizes a party, thinking himself aggrieved, “to make his complaint thereof by appeal to the justices of the peace at the said quarter sessions, upon giving the *568] *surveyor ten days’ notice,” &c. The notice is thus a condition precedent to the right of appeal to the sessions, which, by sect. 85, are the sessions held next after the expiration of four weeks from the lodging of the certificate with the clerk of the peace. [COLERIDGE, J.—According to your view, what was the use of the proviso at the end of sect. 88?] It seems to have been added out of abundant caution. In *Rex v. The Justices of Staffordshire*, 7 T. R. 81, a case upon sect. 19 of the old Highway Act, 13 G. 3, c. 78, which provides for the right of appeal “upon giving ten days’ notice,” it was held that there was no right of appeal at all when ten days’ notice had not been given. (The Court then called on the other side to continue their argument against the rule.)

Welsby and *Sowler*.—It is difficult to distinguish sect. 81 of stat. 4 & 5 W. 4, c. 76, from sect. 88 of stat. 5 & 6 W. 4, c. 50. In each case the provision is that, in default of proper notice, “it shall not be lawful” for the appellant “to be heard in support of such appeal.” The argument on the other side, as has been pointed out, makes the proviso

(a) Affirmed in Exch. Ch., 7 E. & B. 47 (E. C. L. R. vol. 90).

(b) See 7 E. & B. p. 44 (E. C. L. R. vol. 90).

(c) See *Regina v. Eyre*, 7 E. & B. 619 (E. C. L. R. vol. 90).

at the end of sect. 88 unmeaning. This proviso clearly assumes the appeal to be in existence independently of the notice. The question is, as in *Regina v. The Justices of Cheshire*, 8 A. & E. 398 (E. C. L. R. vol. 34), whether the Sessions had jurisdiction to receive the appeal at all; if they had, their power to adjourn is unquestionable: *Rex v. The Justices of Wilts*, 8 B. & C. 380 (E. C. L. R. vol. 15). As to the question, whether the notice was in time, it must be admitted that, according to two decisions of Erle, J., in the Bail Court, **Regina v. Justices of Suffolk*, 4 D. & L. 628, and *Regina v. Justices of Suffolk*, 5 D. & L. 558, the notice ought to have been given ten days before the holding of the sessions at Lancaster, and that it was not sufficient to give it ten days before the adjourned sessions at Salford. But, under stat. 5 & 6 W. 4, c. 50, s. 85, the expression is "at the quarter sessions which shall be holden for the limit within which the highway" "shall lie, next after the expiration of four weeks," &c., not simply "the next general quarter sessions, which shall be holden within the limit where the same shall lie, after such order made or proceeding had," as in stat. 13 G. 3, c. 78, s. 19, which was the clause under consideration in *Rex v. The Justices of Staffordshire*, 3 East 151. It seems that, if this rule be made absolute, the appellant will be without remedy: *Rex v. The Justices of Yorkshire*, 3 T. R. 776.

Lord CAMPBELL, C. J.—We are called upon to construe sect. 88 of stat. 5 & 6 W. 4, c. 50. That section allows an appeal "upon giving" ten days' notice, together with the statement of grounds of appeal. The English language has not terms which could more pointedly express that the giving the notice is a condition precedent to the appeal. The party thinking himself aggrieved may "make his complaint thereof by appeal to the justices of the peace at the said quarter sessions, upon giving to the surveyor ten days' notice in writing of such appeal." How then can there be an appeal without a complaint? But the complaint is not to be except "upon" notice. If the case stood there, there would be no difficulty and no injustice. But then comes the proviso: *and [*570 we are to consider whether that gives power to the sessions to enter and respite the appeal without hearing it. The proviso is "that it shall not be lawful for the appellant to be heard in support of such appeal unless such notice and statement shall have been so given as aforesaid." This proviso, which seems to have been introduced to make the enactment more stringent, has, it is contended, the effect of doing away with it, so that the party may complain and appeal, without giving due notice, but cannot be heard. No doubt, if there were any decision upon words exactly the same, we should be bound by them. But *Rex v. Kimbolton*, 6 A. & E. 603 (E. C. L. R. vol. 33), and the other cases cited on behalf of the appellant, admit of the explanation which was thrown out by my brother Erle, that they rest upon the statutes relating to the poor. The question in those cases has been, whether, independently of the notice, the sessions, having received the appeal without notice having been given, could deal with it so far as to respite it. As to the proper time of notice, we can give no more effect to the arrangements for adjournments than if the sessions had continued uninterrupted from the first day of holding at Lancaster.

COLERIDGE, J.—I am of the same opinion. I think *Rex v. Kimbolton* has been distinguished. That was an appeal under the Poor Law statute,

4 & 5 W. 4, c. 76. Here we have to determine as to an appeal given by the Highway Act: and, it being an appeal given by statute, we are of course limited by the statutory words. Now sect. 88 of stat. 5 & 6 W. 4, c. 50, allows the party to make his complaint by appeal "upon *571] giving" ten *days' notice. It would be frittering away the words if we were to hold that the appeal could be made without such notice being given; they are equivalent to the words "if he shall give" such notice: if he has not given such notice, the appeal falls to the ground. Thus the case stands, without taking into consideration the proviso. At first the argument was applied to the proviso exclusively. And, if the notice were required by that alone, it would have been successfully argued from the words, and from the authority of *Rex v. Kimbolton*, 6 A. & E. 603 (E. C. L. R. vol. 33), that the want of notice affected only the right to be heard. But that is not so. We have to take into account the earlier part of the section, which imposes the restraint generally. Now, if, after saying that there shall be no appeal without notice, there comes a clause stating that in default of notice a particular consequence shall follow, it would be a violent construction to limit the prohibition by attaching such consequence only to it.

WIGHTMAN, J.—The word "upon" clearly imposes a condition, perhaps the more positively so because the surveyor is required, within forty-eight hours of his receipt of such notice, to deliver a copy to the party requiring the application to the justices. Then comes the proviso: and it is said that this shows that the only penalty attached to the want of notice, or of the statement of the grounds of appeal, is that the party shall not be heard: but the terms of the proviso are "provided also;" and it seems that the proviso is added out of abundant caution; that, as the appeal might possibly have been lodged without the requisite notice, *572] it was *proper to enact that the appellant in such case should not be heard.

ERLE, J.—I also am of opinion that the rule should be made absolute, and that the party had not qualified himself to be appellant. The appeal is given by statute, in words which very specifically impose a condition. The word is "upon;" that is, "not unless." And this view is confirmed by the object of the statute. The statute abridges public rights by stopping highways: the justices are to make a certificate, which is to be lodged with the clerk of the peace: and, at the quarter sessions held next after the expiration of four weeks after the certificate being lodged, it is to be read in open court. The object of this is to give publicity. Then comes an enactment that you may appeal to a particular session, but must give notice of the appeal. The sessions is placed at that interval in order to give time for consideration, so that the public rights may be definitely fixed. But it is said that the proviso shows that without notice the appeal may be entered and heard afterwards, upon due notice. It seems to me, however, that the section excludes the hearing of any appeal at all unless the specified notice has been given before the particular session named. *Rex v. Kimbolton*, 6 A. & E. 603 (E. C. L. R. vol. 33), and the other cases which have been cited respecting appeals as to poor-rates and removal of the poor, are not applicable, inasmuch as they were decided upon particular enactments different from that which we have to consider here. Rule absolute.

*In the matter of the BEDMINSTER UNION. Nov. 23. [*573

Stat. 11 & 12 Vict. c. 110, s. 3 (which enacts that the costs incurred for paupers rendered irremovable by stat. 9 & 10 Vict. c. 66, shall, when the parish is comprised in an Union formed under stat. 4 & 5 W. 4, c. 76, be charged to the common fund of such Union) is applicable to the case of a pauper whose settlement is not known, it not being known that he has no settlement, and who has resided without interruption for five years in a parish in an Union, so that, if his settlement were found to be elsewhere, he would still not be removable.

BODKIN moved for a certiorari to remove into this Court the allowance and charge of the auditor of the Bedminster Union as to a pauper named Greenslade. The auditor decided that the charge in respect of the relief of the pauper should be debited to the account of the Union and credited to the separate account of the parish of Bedminster, one of the parishes of the Union. He assigned, as his reason, that evidence had been brought before him showing that the parish of Bedminster was not the place of the pauper's legal settlement; that the pauper was irremovable, under stat. 9 & 10 Vict. c. 66, from the parish of Bedminster; and that therefore, under stat. 11 & 12 Vict. c. 110, he was chargeable to the Union. The charge had been made to the separate account of the parish. It appeared that the pauper had resided upwards of fifty years in Bedminster; and that, upon inquiry (especially on an examination of the pauper touching his settlement taken before justices at Bristol), his settlement could not be ascertained.

Bodkin, in support of the application.—The pauper's settlement not being known, stat. 11 & 12 Vict. c. 110, s. 3, is inapplicable; the pauper is irremovable independently of stat. 9 & 10 Vict. c. 66, inasmuch as there is no place to which he can be removed. *Regina v. Bennett*, 8 E. & B. 341, (E. C. L. R. vol. 77), is expressly in point. [ERLE, J.—There the *birth-place of the pauper was known to be extraparochial; and he had acquired no settlement. COLERIDGE, J.—Here, if [*574 at any moment the birth place of the pauper should be ascertained, he would be removable to such place, except for stat. 9 & 10 Vict. c. 66.] He is irremovable now, without the aid of the statute. [COLERIDGE, J.—Not legally so; only because his birth-place is not known. In *Regina v. Bennett* he was positively irremovable without the aid of the statute. ERLE, J.—That was clearly the view taken by the Court. My brother Coleridge pointed out that, if the Union were chargeable, all the paupers who had resided five years in the extraparochial place would be chargeable to the Union.] The principle of *Regina v. Bennett* is that no one shall be charged to the Union by reason of an irremovability not exclusively caused by stat. 9 & 10 Vict. c. 66. Here the pauper is practically irremovable for another cause. [ERLE, J.—No more so than any man whose settlement was not found out at the time in which the charge arises, though it may be found out next day.]

Per CURLAM.(a)

Rule refused.

(a) Lord Campbell, C. J., Coleridge, Wightman, and Erle, Js.

***575] FREDERICK LEVY and ABRAHAM LEVY v. HENRY GREEN. Nov. 24.**

Action for goods sold and delivered. Plea, Never indebted. It appeared on the trial that defendant ordered of plaintiff specified quantities of particular kinds of crockery to be sent to him by railway. Plaintiff sent a crate containing a smaller quantity of the particular goods, also other goods not ordered, and of such a nature as to be distinguishable from the others; and he sent one invoice debiting defendant with the whole contents of the crate. Defendant refused to receive them, assigning as his reason that they were out of time. At the trial, the objection was taken that defendant was not bound to take any part of the goods, because of the manner in which they were sent, accompanied by goods not ordered. Leave to enter a nonsuit on this ground was given, subject to which the case went to the jury, and the plaintiff had a verdict for the goods ordered.

Held by Lord Campbell, C. J., and Wightman, J., that, under these circumstances, the vendor had not furnished the goods so that the vendee was bound to accept them, and that there ought to have been a nonsuit.

Held by Coleridge and Erie, Js., that the vendee might have taken his own goods and rejected the excess.

The Court being equally divided, the rule dropped.

ACTION for goods sold and delivered, and on accounts stated. Plea: Never Indebted. Issue thereon. The following were the particulars of demand.

1856.		£ s. d.	
Oct. 24.	To 3 dozen plain worked Teapots @ 6/6	0 19 6	
"	" 3 figured do. @ 7/6	1 2 6	
"	" 3 Eagle do. @ 10/6	1 11 6	
"	" 3 Queen's do. @ 9/6	1 8 6	
"	" 3 Dishes do. @ 2/3	0 6 9	
"	" *6 Sets Jugs Cupids Birds' Nest and Fishes @ 1/4	0 8 0	
"	" *6 Gambler, Monkey, and Grapes @ 1/-	0 6 0	
"	" *6 Miser, Stag, and Octagon @ 1/-	0 6 0	
"	" *2 Common Jugs @ -/8	0 1 4	
"	" *2 Pear Shapes @ -/7	0 1 2	
	Crate	0 6 0	
		<hr/> £6 17 3 <hr/>	

***576]** *At the trial, before the undersheriff of Bristol, under a writ of trial, the plaintiffs had a verdict for 5*l.* 14*s.* 9*d.*, the amount of the particulars, excluding the five items marked *, subject to leave to move to enter a nonsuit.

Field, in this Term, obtained a rule Nisi accordingly, which was drawn up on reading a copy of the undersheriff's notes.—From these it appeared that the traveller of the plaintiffs called on the defendant at Peterborough on the 29th September, 1856, and received an order for some articles of crockery, to be forwarded as soon as possible by rail to Peterborough. There was a conflict of testimony as to whether there was any stipulation that the goods were to be supplied within any specified time or not. The order was forwarded by the traveller to the plaintiffs' manufacturer, who, on the 24th October, 1856, sent off a crate to Peterborough addressed to the defendants. This crate contained the articles specified in the particulars of demand. The four first items it was admitted agreed with the order; six sets of dishes had been ordered of

the kind of which three sets formed these items. The five items marked *, it was admitted, had not been ordered. On the 23d October the defendant wrote to the plaintiffs to countermand the order, on the ground that, owing to delay, he had been obliged to supply himself elsewhere; but this letter was not received till after the goods had been already despatched. An invoice was forwarded to the defendant, from which the particulars of demand were taken. Some evidence was given that it was usual, where a crate was not completely filled by the goods ordered, to fill it up with other articles on sale or return; and there was some evidence that the defendant had cautioned the traveller not to do so. At subsequent interviews, the traveller *requested the defendant to pay for the goods, which lay at the Peterborough station, and the defendant refused to do so, alleging that the goods were to be supplied in a fortnight, and that, not having been sent in time, he had got supplied elsewhere. At these interviews he said nothing about the extra articles. The defendant's solicitor applied for a nonsuit, citing *Hart v. Mills*, 15 M. & W. 85.† The undersheriff reserved leave to enter a nonsuit. The solicitor of the plaintiffs gave up the demand for the price of the extra articles. The questions left to the jury were: whether there was by the bargain a specific time within which the goods were to be forwarded; and, if there was none, whether they were forwarded within a reasonable time. The verdict was for the plaintiffs. [*577]

Baratow now showed cause.—The ground of the decision in *Hart v. Mills*, 15 M. & W. 85,† is explained by *Cunliffe v. Harrison*, 6 Exch. 903.† In both cases the excess above the order consisted of goods of the same species as those ordered, so that it was impossible to say which hogsheads or which bottles of wine were sold. That is the ground of the decisions. Parke, B., in *Cunliffe v. Harrison*, 6 Exch. 906,† says: "The plaintiff, in order to maintain his action, must prove that a specific ten were delivered. But the delivery of fifteen hogsheads, under a contract to deliver ten, is no performance of that contract, for the person to whom they are sent cannot tell which are the ten that are to be his; and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him." The absence of specification of the goods alleged to be sold is *the ground of the decision. But here there is no difficulty of that sort: all the teapots and all the dishes sent were ordered. The unordered articles sent were of quite a different kind. [Lord CAMPBELL, C. J.—But what was the defendant to do with those articles in excess? He could not take the goods he had ordered without either taking these articles also, or setting them aside, or perhaps returning them. Had you a right to cast upon him that burthen? ERLE, J.—That trouble would not be great. The crate would probably be returned, and the articles might well go with it. But in truth it appears to me that the defendant never rejected on this ground at all. He said the goods were out of time, and defended on that ground; then, before the trial, his attorney found the case *Hart v. Mills*, 15 M. & W. 85,† and suggested that point.] [*578]

Field, in support of his rule.—The action is for goods sold and delivered; and therefore the plaintiffs must prove a sale and a delivery. The crate no doubt arrives at Peterborough station, containing some such goods as were ordered, though not as many of those as were

ordered. It also contains other goods not ordered. And it is accompanied by an invoice debiting the defendant, without any distinction, with the whole of those goods. The defendant does in fact, for whatever reason, refuse to accept the goods. That would not avail him if they were so delivered that he was bound by the contract to take them; but that was not so. A simple taking of the goods without explanation would have been an acceptance, or at all events strong evidence of an acceptance, of the whole, according to the terms of the invoice. So, *579] if the defendant took part, he must risk being held to have taken the whole, and must encounter trouble to avoid it. The vendor cannot charge the vendee unless he, the vendor, be ready and willing to deliver the goods so that the vendee may have them without any burthen beyond what he has contracted to undertake. It is analogous to a tender of money, which is bad if the creditor is required to give change. And the authorities cited are in point. The vendee, in *Cunliff v. Harrison*, 6 Exch. 903,† might easily have taken ten hog-heads and sent back five if he pleased, but he was not bound to do so. [Lord CAMPBELL, C. J.—But, supposing the objection good, the defendant might waive it. Did he not here do so?] There is, no doubt, evidence that, when rejecting the goods, he assigned other reasons and was silent as to this. But, if a man has a legal justification for what he does, it is not necessary that he should state it or even act on it. A master may dismiss a servant for one reason and justify the dismissal on another. But at most there was only evidence of a waiver; the point was not left to the jury nor reserved for the Court.

Lord CAMPBELL, C. J.—I am of opinion that this rule ought to be made absolute. I think very decidedly that the defendant had, under these circumstances, a right to reject the goods, and that the plaintiffs had not so fulfilled their duty as vendors as to be in a position to make the defendant liable. Particular quantities and kinds of goods were ordered to be sent by railway to Peterborough, with a caution not to send more. A crate arrives at the station there containing the goods *580] ordered and also several other kinds of goods not ordered. The whole are in one package; and they are accompanied by one invoice, making one charge for the whole of the goods in that crate. It seems to me that this was not a performance of the contract of the plaintiffs; for I think that their contract as vendors was to supply the goods in such a manner that the purchaser might receive them and apply them to his own use without incurring trouble, risk, or expense beyond what by the contract he was to incur. If the defendant here had wished to take as purchaser those goods which he had ordered, how could he do it? It is suggested that he might open the package and select his own; but, if he did, what was he to do with the others? If he silently takes the goods thus sent, he will be taken to have accepted the whole, and to be liable for the price of the whole: to avoid that he must at least write to the vendors; but the vendors had no right to cast upon the purchaser an obligation to write. I think they had performed their duty as vendors in an imperfect manner. Cases may be suggested, such as that the package contains samples of other goods offered for sale, or other things, the receipt of which would cast on the purchaser neither risk nor trouble; but these are very different from the present. When the defendant read the invoice, and found himself charged with the price

of goods he did not order in one charge with those he did order, and that the whole were in one crate, I think he had a right to reject the goods he did order on that ground. But he might waive the objection; and at one time I thought he had done so: but, on looking at the evidence, it appears that it comes only to this, that he did not assign this as his ground of rejection. I do not lay down any general rule of law, that whenever more is *sent than is ordered the purchaser may [*581 reject what was ordered; but I say that, under the circumstances here, the place of delivery being distant from the vendors, the caution being given to send only what was ordered, the goods ordered and those not ordered being included in one invoice and one charge being made for the whole, and all the goods being in one package, I think that the purchaser, if he accepted the part ordered, would have been in peril of being fixed with the price of the whole; and that, under those circumstances, he had a right to reject the goods, which it does not appear that he waived. I therefore think that the rule should be absolute.

COLERIDGE, J.—I am not prepared to agree in making the rule absolute. I think that there was evidence of a waiver, as the defendant, after he had the invoice and was aware of the facts, gave as his reason for not taking the goods that the whole were out of time, and did not mention this objection; but, as this was only evidence to go to the jury, and it was not asked that the point should be left to them, I do not proceed upon that ground. But I think that the mere addition of distinguishable articles to an order does not entitle the purchaser to reject the goods ordered. The cases in the Exchequer seem to proceed on the very sound doctrine that, where the goods are undistinguishable, it is an attempt to substitute for a sale of specific goods an offer to permit the purchaser to supply himself out of a stock of such goods, which is a contract of a different nature. But this is not so where the goods are of a different species from those ordered. I agree with my Lord that the vendors had no right to cast upon the purchaser any fresh duty: *but I do not think that, if the purchaser had taken his own [*582 goods, it would have cast upon him any legal duty with regard to the others. There might be a duty of imperfect obligation, a moral duty: but even that would at the most extend to making it right to set the rejected goods aside, and write to the consignors to say where they might get such goods. I do not think that the purchaser was excused from accepting the goods because such a duty might be imposed upon him.

WIGHTMAN, J.—I agree with my Lord, on the ground that I think the plaintiffs have not performed their part of the contract in such a way as to be entitled to call upon the defendant to accept the goods. The contract consisted in an order for various articles to be supplied by the plaintiffs, and sent by them to the defendant by railway at Peterborough. They did send the articles ordered, but with them other articles not included in the order. There was an invoice making the defendant debtor for the whole of the articles. All came to Peterborough in one package; and it is said that the purchaser might open the package and select his own. But it seems to me that the plaintiffs had no right to cast upon the vendee the obligation to do this. It would throw upon him the trouble of severing his own goods from the others, with at least some risk of being thereby made liable as accepting

the whole. And is he bound to send the others back, or to take any care of them? Is he to be liable for any damage that they may sustain in the course of unpacking? It may be he would not; but I think that the plaintiffs were not justified in performing their contract in such an imperfect manner as to cast upon the purchaser these risks. Then I *583] think that there is no *distinct evidence of any waiver of this objection; but, if there were, the point was not left to the jury. The case therefore stands simply upon this: Was the vendee bound to take and pay for the goods on this imperfect performance of the vendor's contract? I think a sufficient performance is not made out by the plaintiffs, and that therefore the rule should be absolute.

ERLE, J.—I agree with my brother Coleridge in thinking that the rule should not be made absolute. The original order was to supply certain goods in a reasonable time. The plaintiffs thought a month a reasonable time; the defendant thought a fortnight enough; and after the fortnight he thought the order not fulfilled. On the ground of delay, the defendant wrote to countermand the delivery. Nothing was said then or at any time till after the action about other goods being in the crate; that is stated as a defence for the first time by the attorney. The facts seem to be that, there being space to spare in the crate, the extra articles were put in by way of dunnage, as it were. I have listened attentively to my Lord's reasons for thinking that the presence of these articles entitles the purchaser to refuse the goods ordered, because of the trouble of unpacking and the risk of dealing with these articles not ordered, all of which were included in one invoice. But, if the letter enclosing that invoice had in terms said, "We send you the goods ordered, and to fill up space we take the liberty of adding some other articles, which you may keep or return as you please," it seems to me it would but have been what the parties knew. The case would not *584] have been altered from what it is. There may be *circumstances under which the presence of superfluous articles would furnish a good ground for rejecting those ordered. But I cannot think it so here. The whole seems to me an after-thought. Rule dropped.

The general rule is that where goods are ordered of a merchant or manufacturer of a particular specified description, or of a particular quantity, and the goods sent are of a different description, or of a less quantity, the vendee may refuse to receive them, and in that case, an action for goods sold and delivered will not lie: *Bruce v. Pearson*, 3 Johns. 534; *Waldo v. Halsey*, 3 Jones L. 107. But in *Davis v. Adams*, 18 Alab. 264, where upon a contract to sell and deliver 50 bales of cotton of the vendor's first picking, a tender of 55 bales, with a proposal to the vendee to select 50 out, was held a substantial compliance with the con-

tract. In *Downer v. Thompson*, 2 Hill 137, 6 Hill 208, the same question arose. There the plaintiff, having received an order from the defendant to forward two hundred and *fifty* barrels of cement, sent by a carrier two hundred and *sixty* barrels, which the defendant refused to receive, saying, amongst other things, that there were more than he ordered, *and that the quality was not good*, whereupon the carrier took away the cement and stored it. Afterwards, a letter was written to the plaintiff by the defendant, in which he placed his refusal to receive the cement on the sole ground that the quality was not good; but admitted

that the order had been complied with in the number of barrels. The plaintiff then brought an action for the value of the 250 barrels, declaring both for *goods sold and delivered*, and for goods *bargained and sold*; but he was nonsuited on the trial, because the number of barrels ordered had been delivered to the carrier as part of a greater number, without being counted out or separated, and therefore no sale had taken place. This nonsuit was sustained in the Supreme Court; but on error, the Court of Appeals reversed the decision, and held that the case should have been submitted to the jury; for if the entire quantity of cement delivered to the carrier, was intended as a mere compliance with the order, and was not sent for the purpose of charging the defendant with the excess, he was liable.

The QUEEN v. BATEMAN. Nov. 24.

The provisions of stat. 12 & 13 Vict. c. 45, s. 18, for enforcing orders of Sessions, apply only to orders properly so called, and not to judgments of the Court of Quarter Sessions on indictments tried before them.

HUDDESTON moved for a rule for an attachment against the defendant. From his statement it appeared that the defendant had been indicted before the Quarter Sessions for Herefordshire for a nuisance, and found Guilty. The quarter sessions had made an order that the nuisance should be abated. That order had been removed into the Court of Queen's Bench under stat. 12 & 13 Vict. c. 45, s. 18, which enacts that, in all cases where any order shall be made by any court of general or quarter sessions of the peace, it shall be lawful for the Court of Queen's Bench or a Judge, upon proof of refusal or neglect to obey the order, to direct it to be removed into the Court of Queen's Bench; and thereupon it may be enforced in the same manner as a rule of the Court of Queen's Bench. The nuisance had not been abated. The motion was made before Crompton, J., in the Bail Court, who expressed a doubt whether the Act applied to such a case, but referred the matter to the full Court. [Lord CAMPBELL, C. J.—In legal language we do not call a judgment on an indictment an order. The Act seems to refer to the class of *orders for disobedience to which there was at common law no redress except by an indictment for disobeying the order; not to judgments on an indictment enforceable by fine and imprisonment. ERLE, J.—The jurisdiction exercised by the Court of Quarter Sessions making orders as such is essentially different from that of the same Court sitting as a Court of oyer and terminer to try indictments.]

Per CURIAM.(a) There will be no rule.

Rule refused.

(a) Lord Campbell, C. J., Coleridge, Wightman, and Erle, Js.

JAMES WATERLOW and two Others v. MATTHEW DOBSON.
Nov. 24.

The provisions in stat. 19 & 20 Vict. c. 108, s. 18, do not affect the right to costs in cases where the superior courts have concurrent jurisdiction with the county courts.

H. JAMES, in this Term, obtained a rule to show cause why the plaintiffs should not have their costs, and why the Master should not tax the same.

From the affidavits on both sides it appeared that the plaintiffs issued a writ in this Court against the defendant for 4*l.* 5*s.*; the defendant paid the debt, but refused to pay the costs. The plaintiffs carried on business together within the district of the Westminster county court of Middlesex; and two of them dwelt there; but the third did not dwell there. The defendant both dwelt and carried on business within the district of the Whitechapel county court of Middlesex, less than twenty miles from the place of business of the three plaintiffs and the dwelling-
*586] place of two of them, but more than twenty miles from the dwelling-place of the third plaintiff.

Petersdorff now showed cause.—It must be admitted that, as one of the plaintiffs dwelt more than twenty miles from the defendant, the superior Courts had, under stat. 9 & 10 Vict. c. 95, s. 128, concurrent jurisdiction with the county court; but stat. 19 & 20 Vict. c. 108, s. 18, enacts that, “where a plaintiff shall dwell or carry on business in the district of” any of the Metropolitan county courts, “and the defendant shall dwell or carry on business in the district of any of the said courts, the summons may issue and be served either in the district in which the plaintiff shall dwell or carry on business, or in the district in which the defendant shall dwell or carry on business.” The facts bring the case within the section. [ERLE, J.—The object was to enable a Metropolitan tradesman to issue all the summonses against his Metropolitan debtors out of the same court, and have them all brought on in the same day. It is an enabling section, and does not restrict his right to sue in the superior Courts.]

H. James was not called upon to support his rule.

Per CURIAM.(a)

Rule absolute.

(a) Lord Campbell, C. J., Coleridge, Wightman, and Erle, J.

*587] *GOODWIN v. NOBLE and Others. Nov. 25.

M., being lessee of certain premises for a term of years to G., under a lease containing a covenant by G. that M. should at any time during the term be at liberty to purchase the freehold, and having made arrangements for borrowing a sum of money for the purpose of making such purchase, agreed with A., in consideration of A.'s having paid off certain mortgages upon the premises, to assign the said freehold to A. by way of mortgage, subject to a first mortgage to the lender of the purchase-money. A deed was executed by M., which recited among other things, that G. had conveyed the freehold to M., leaving a blank for the date of the indenture of conveyance, and recited also that M. had made a mortgage to the lenders of the purchase-money, a blank being left for the date of the deed of mortgage. It then witnessed that M. conveyed the premises (subject to such last-mentioned mortgage), “and all the estate, right, title, interest, property, claim, and demand whatsoever” of M. in the said

premises, to A., his heirs and assigns, for ever. The freehold was not then, nor was it eventually, conveyed by G. to M.

Held, that the deed did not pass M.'s leasehold interest; that, looking at the intention of the parties, the deed must be construed as intended to pass the freehold, when purchased; and that, such purchase never having been made, the deed was, with respect to those premises, wholly inoperative.

The assignees of a bankrupt, lessee of an hotel, upon the bankruptcy closed the hotel, with the exception of the tap, which was occupied by a third party, tenant to the bankrupt before the bankruptcy. He was supplied, by order of the assignees, with beer and spirits at a slight advance over cost price, he keeping the proceeds of the business for himself, and the profit on the sale to him being credited to the bankrupt's estate. The license of the tavern was renewed in the bankrupt's name by the assignees. A distress was put in upon the premises on two occasions by the lessor; and the assignees, after asking for time, paid rent and costs of distress, for the purpose, as they stated, of saving the furniture, which was afterwards removed from the premises by their order. On their being threatened with ejectment for certain breaches of covenant, their attorney said they would resist the ejectment. The tap was afterwards closed by their order.

Held, on a case giving the court power to draw inferences of fact, that these acts did not show an election to take the lease.

Under circumstances leaving it in doubt whether the assignees are adopting a lease or not, the lessor should take steps to compel the assignees to elect, under The Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), s. 145.

COVENANT on an indenture of lease, dated 6th June, 1853, by which plaintiff demised to Thomas Masters certain premises called The Beulah Spa Hotel, for twenty-five years. The declaration set out the lease, which contained covenants by Masters to pay the rent; to lay out 500*l.* upon the premises within two years; to keep the premises in repair; to insure them; and to keep the hotel open as a tavern. Averment: that, after the making of the said indenture, and during the said term thereby granted, to wit, on, &c., all the estate and interest of the said T. Masters in the said premises, by assignment thereof, legally came to and vested in *defendants: whereupon defendants entered into and [*588 upon the said premises, and were possessed thereof from thence during all the time of the happening and committing by defendants of the breaches of covenant thereafter mentioned. Breaches: non-payment of rent; non-expenditure of 500*l.* on the premises within two years; non-repair; non-insurance; and not keeping open the hotel as a tavern. A count was also added, by Judge's order, for use and occupation.

Pleas to the first count: 1. That all the estate and interest of the said Thomas Masters in the said premises, by assignment thereof, did not come to or vest in the defendants as alleged. Issue thereon.

2. That, after the making of the said indenture, and before the commencement of this suit and the bankruptcy of the said T. Masters thereafter mentioned, the said T. Masters, by an indenture dated 30th December, 1854, granted and assigned the said premises to C. Appleyard and R. Simpson, their heirs and assigns, for ever, subject as in the said indenture expressed: that, after the making of the said indenture, and while the same was in force, the said T. Masters became bankrupt, and defendants were duly appointed assignees; and that the assignment in the declaration mentioned was an assignment to defendants as such assignees. Issue thereon.

3. That the assignment in the declaration mentioned was an assignment to defendants upon and by reason of the bankruptcy of the said T. Masters, who, after the making of the indenture in the declaration

mentioned, became a bankrupt within the meaning of The Bankrupt Law Consolidation Act, 1849; that defendants were duly appointed assignees; and that, save under such bankruptcy, the estate and interest *589] of the *said T. Masters in the declaration mentioned never came to defendants by assignment: and that defendants, as such assignees, never elected to take the said premises within the meaning of the provisions of the said statute; nor were they, as such assignees, ever required to elect whether they would accept or decline the same according to the provisions of the said statute; nor did plaintiff, being entitled to the rent under the said demise in the declaration mentioned, ever apply to the Court of Bankruptcy for an order; nor did the said Court ever order defendants, as such assignees, to elect, or make any other order touching the accepting or declining of the same by defendants as such assignees, under the provisions of the said statute.

Replication: that defendants did elect to take the said premises. Issue thereon.

4, to the second count: Never indebted. Issue thereon.

At the trial, at the Summer Assizes for Surrey, 1856, a verdict was taken for the plaintiff, subject to the opinion of this Court upon a special case and to the determination of an arbitrator as to the amount of the damages; the Court to be at liberty to draw the same inferences of fact as a jury. A case was accordingly stated, the material part of which was as follows.

On 6th June, 1853, the plaintiff, owner in fee, granted to the said Thomas Masters a lease of The Beulah Spa Hotel, tap, grounds, and premises, for twenty-five years from 24th June, 1852, at the yearly rent of 200*l.*, payable quarterly. The lease contained the usual covenants to pay the rent, and also covenants to lay out, within two years from the date of the lease, 500*l.* in permanent improvements, to repair and *590] keep in repair and preservation the *gardens and premises, to keep open the tavern, and to insure against fire; and a covenant for re-entry in case of forfeiture. It also contained a proviso that the said T. Masters, his executors, administrators, or assigns, should be at liberty to purchase the freehold and inheritance of the said premises, at any time within three years from the date of the lease, on paying to the plaintiff, his heirs or assigns, the sum of 5000*l.*

Masters entered upon the demised premises, and continued in possession, carrying on the business of the tavern and tap down to the time of his bankruptcy, which took place on 22d January, 1855.

At the time of the bankruptcy of the said Thomas Masters, Messrs. Barclay & Company were equitable mortgagees of the said lease for the sum of 3000*l.* and upwards.

In 1853 and 1854 the said Thomas Masters had mortgaged certain other premises, held by him on a lease for ninety-nine years, and known as The Crystal Palace Hotel, and two policies of insurance on his life, to certain parties by way of security for moneys advanced by them to him, amounting to 10,500*l.* He agreed with Appleyard and Simpson, in consideration of their paying off, at his request, that sum, and 500*l.* for interest, to assign to them, by way of mortgage, the lease of the said Crystal Palace Hotel, and the said policies of insurance, and to give them a charge upon The Beulah Spa Hotel and premises, of which he was about to purchase the freehold, in pursuance of the covenant before

mentioned. He had agreed with two persons named Mayo and a person named Hudson for the loan of 7000*l.* for the purpose of making such purchase and paying off Messrs. Barclay's claim. The charge in favour of Appleyard *and Simpson was to be subject to a charge for this [*591 7000*l.* in favour of the Mayos and Hudson.

A deed, dated 30th December, 1854, was prepared in pursuance of this agreement. It purported to be made between Masters of the one part, and Appleyard and Simpson of the other part; and, after reciting, among other things, the various charges made by Masters on The Crystal Palace Hotel and premises, the payment by Appleyard and Simpson, at Masters's request, of the sums so secured, to the several parties entitled, and the assignment by the said parties to Appleyard and Simpson of their respective rights as mortgagees of the said premises and assignees of the policies, proceeded to recite that Goodwin had conveyed to Masters the freehold of The Beulah Spa Hotel and premises; leaving a blank for the insertion of the date of the deed of conveyance. It then recited successively three mortgages by Masters, to Elizabeth Mayo, Hubert Mayo, and Thomas Bently Hudson, respectively, of The Beulah Spa Hotel and premises. In the first two recitals a blank was left for insertion of the date of the indenture and the amount secured, and in the third a blank for the insertion of the date of the indenture only. The deed witnessed (among other things) as follows: "he the said Thomas Masters doth by these presents grant, convey, and confirm unto the said Charles Appleyard and Richard Simpson, their heirs and assigns, all that messuage," &c. (describing The Beulah Spa Hotel and premises), "and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof and of every part thereof, and all the estate, right, title, interest, property, claim, and demand whatsoever of him the said Thomas Masters unto and out of the same premises and every part thereof, *to have and to hold" [*592 "unto the said Charles Appleyard and Richard Simpson, their heirs and assigns, to the use of the said Charles Appleyard and Richard Simpson, their heirs and assigns, for ever, subject nevertheless to the said several indentures of the day of , the day of , and the day of "

(blanks being left for the dates), "and to all rights and equities thereunder subsisting;" and also to a proviso for redemption. Before execution of the deed, application was made to Messrs. Barclay for the lease of the premises, which they held as equitable mortgagees. Messrs. Barclay refused it, their full claim not having been satisfied: the Mayos and Hudson consequently refused to advance the 7000*l.*; and the conveyance by the plaintiff of the freehold, and the mortgages by Masters to the Mayos and Hudson, were never made. The deed, however, was eventually executed by Masters, before his bankruptcy, all the said blanks still remaining. Masters did not, previously to his bankruptcy, lay out the full sum of 500*l.* in permanent improvements, nor exercise at any time the power of purchasing the freehold. On 25th January, 1855, Masters was adjudicated a bankrupt, then owing the plaintiff 100*l.* for two quarters' rent up to Christmas 1854. On 5th February, 1855, the defendants were appointed the creditors' assignees, and Mr. Pennell the official assignee.

Upon the bankruptcy of Masters, a messenger of the Court of Bank-

ruptcy was put in possession of The Crystal Palace Hotel, and carried on the business there for the benefit of the estate. Another messenger was put in possession of the furniture and effects which Masters had at *593] the time of his bankruptcy in and upon *the Beulah Spa Hotel and premises: and those premises (with the exception of the tap, in which Masters had no effects) were closed, by the direction of the defendants; and no business was carried on there, except at the tap. There business was carried on in the following manner. Previously to and at the time of Masters becoming tenant of the premises, one Isaac Smith occupied the tap, all the furniture and effects in which, other than the fixtures, belonged to the said Smith, the fixtures being the plaintiff's. The tap adjoined the hotel; and the tap cellar extended beneath both: but the tap and the hotel did not communicate. Smith continued to occupy the tap during Masters's tenancy. He never paid any rent to Masters, nor to the assignees after the bankruptcy: but Masters, before the bankruptcy, supplied him with beer and spirits, and charged him about 6s. per barrel for the one, and about 3s. per gallon for the other, over the cost price, Smith keeping the proceeds of the business for himself. After the bankruptcy, Cattell, the messenger in possession at the Crystal Palace Hotel, supplied Smith with, and charged him for, beer and spirits from that hotel, upon the same terms, paying in his receipts from Smith to the official assignee as money received at the Crystal Palace Hotel. In the audited account of the official assignee these receipts in respect of the beer were set down to the credit of the bankrupt's estate as "profit of beer sold at the Beulah Spa Hotel." The defendants were not consulted on, nor did they interfere in, Cattell's transactions with Smith: but the tap was kept open by their directions, for the sake of preserving the license, there being one license for the hotel and tap; and the license was renewed, *594] after the *bankruptcy, in March, 1855, and March, 1856, in Masters's name.

The Christmas rent for the Beulah Spa Hotel having been applied for on 9th February, 1855, with a threat of distress, the defendants' attorney, on 14th February, 1855, wrote to the plaintiff's attorney as follows:

"The assignees are anxious not to proceed at the present moment to a sale of the property in the Beulah Spa Hotel: but, as they have no funds in hand at the present moment out of which the rent can be paid, it is proposed that Mr. Pennel should give his undertaking for payment of the rent out of the assets there. Will your client accede to this arrangement?"

On 23d February, 1855, the said Christmas rent being then unpaid, the plaintiff distrained on the furniture and property then in the said hotel. Nothing was distrained upon in the tap.

On 27th February, 1855, the defendants' attorney wrote to the plaintiff as follows:

"In Bankruptcy.

"Re Thomas Masters.

"I, the undersigned, as solicitor for and on behalf of the assignees of Thomas Masters, do hereby request that you will continue to hold possession of the property distrained by you at the Beulah Spa Hotel

at Norwood, without proceeding to condemn or remove the same, for the period of seven days from the date hereof.

"To W. J. Goodwin, Esq.,
and to Mr. G. B. Pettit,
his bailiff or agent."

"J. F. ELMSLIE."

On 15th March, 1855, the assignees under the *bankruptcy of the said Thomas Masters, having up to that time been unable [*595 to realize any of the bankrupt's assets, subscribed the amount due for the said rent and costs of distraining; and a check for the amount of the said rent to Christmas, and the charges for the distress, amounting together to 109*l.* 12*s.*, was thereupon enclosed in the following letter to Messrs. Pettit & Son, the brokers, by the defendants' attorney.

"I enclose you a check for 109*l.* 12*s.*, amount of rent and charges in respect of the Beulah Spa Hotel at Norwood, and shall be obliged by a receipt by the bearer.

"Yours truly,

"J. F. ELMSLIE."

"Messrs. Pettit & Son."

On 10th April, 1855, the said furniture and effects remaining in and upon the said demised premises, the plaintiff's attorney applied to the defendants, by letter, for the quarter's rent due at Lady-day.

On 11th April, 1855, the plaintiff's attorney received from the defendants' said solicitor a letter, as follows:

"Dear Sir. Masters. I am obliged by your letter. I hope that your client will allow the rent to stand over for a time, say a fortnight, without proceeding to distrain: by this time I have no doubt the assignees will have received funds, without being obliged to pay the amount out of their own pockets as on the former occasion.

"Yours truly,

"J. F. ELMSLIE."

The rent not having been paid by the defendants, the plaintiff issued a warrant of distress for the Lady-day rent, which was levied upon the furniture and effects in the said hotel: whereupon Mr. Pennell, the official *assignee, paid the amount of the said rent, 50*l.*, to the plaintiff's brokers. The said furniture and effects remained in and [*596 upon the hotel (no part thereof being in or upon the tap) until or about the 20th June, 1855, when they were removed by Cattell to the Crystal Palace Hotel, by direction of the defendants.

The two years within which the 500*l.* was to be laid out, under the covenant in the lease, elapsed on 6th June, 1855, after the bankruptcy of Masters and the appointment of the defendants as assignees: and at that date the said sum of 500*l.* had not been laid out. On 7th June, 1855, the plaintiff's attorney wrote to the defendants' attorney, stating that he had instructions to bring an action of ejectment against the assignees, and asking whether he would accept process on their behalf.

On 29th June, 1855, the defendants' attorney told the plaintiff's attorney that he (defendants' attorney) should "resist the ejectment."

An order having been made by the Court of Bankruptcy (on the petition of Messrs. Barclay, the equitable mortgagees), that the premises should be sold by the assignees on behalf of the equitable mortgagees, the premises were, on 24th April, 1856, put up for sale accordingly, by direction of the defendants' attorney. The property was bought in by Mr. Ware, the solicitor to the said mortgagees; and the mortgagees paid the auctioneer's expenses.

On the hearing of the petition, Appleyard appeared before the court and objected to the order, as mortgagee, under the said deed of 30th December, 1854, of some of the fixtures in the Crystal Palace Hotel which the petition prayed might be sold; but he made no claim in respect of the lease of the Beulah Spa Hotel.

*597] "On 9th June, 1856, the defendants' attorney, on their behalf, caused the tap of the Beulah Spa Hotel to be closed; and it has since continued closed.

The key of the hotel, and the license, were sent by the defendants attorney to Appleyard, who refused to receive them, and sent the following letter to Mr. Elmslie:

"Lincoln's Inn, 25th June, 1856.

"My dear Sir. On my return here I find that you have sent me the key of the Beulah Spa and the licenses. It was arranged between us that they should be sent to Mr. Ware, who, I find from your letter, declines to receive them. I also decline to receive them, and beg to give you notice that I shall be in no way answerable for the premises.

"Believe me," &c.

"CHARLES APPELYARD."

"J. F. Elmslie, Esq."

On 15th July, 1856, a writ of ejectment was issued by the plaintiff against the defendants. Judgment was recovered; and possession was given in October, 1856. No rent has been paid by the defendants since that due upon Lady-day, 1855. Their attorney more than once disclaimed their liability to pay the rent, and stated that it had been paid on the two occasions above mentioned for the purpose of saving the furniture and effects from being sold.

The writ in this action was issued 26th June, 1856.

The defendants had not been required by the plaintiff, or by any person on his behalf, nor had they been ordered by the Court of Bankruptcy, to elect whether or not they would take the said lease of 6th June, 1853; nor had any notice been given by the assignees, or by any person on their behalf, that they declined to take the said lease.

*598] The case then stated the finding of the arbitrator as to damages.

Bovill, for the plaintiff.—First, as to the second issue. The defendants contend that, by the deed of 30th December, 1854, the leasehold interest of Masters in the premises passed to Appleyard and Simpson. But that deed was clearly not intended to pass any interest in these premises till the freehold had been conveyed by the plaintiff to Masters; and that was never done. The defendants rely on the words in the operative part of the deed, "all the estate, right, title, interest," &c. But, first, the deed professes to grant such estate and interest to Appleyard and Simpson, "their heirs and assigns, for ever:" a form which could not apply to the assignment of a mere leasehold interest. No doubt the leasehold interest would have passed by way of merger, if the deed had passed the freehold interest; but it could not do that, the freehold not being yet Masters's to convey. Secondly, the deed must be construed according to the intention of the parties: and it is clear that it was intended to pass the freehold; and that, as it is inoperative for that purpose, owing to the conveyance of the freehold to Masters never having been made by the plaintiff, it is inoperative altogether as to passing any interest in those premises, although, of course, it would be

operative as to assigning the lease of the other premises, the Crystal Palace Hotel. [ERLE, J.—The deed must, I think, be taken to be valid to that extent, and cannot be considered as an escrow, not operating at all till the conveyance of the freehold by the plaintiff to Masters. Lord CAMPBELL, C. J.—That is clearly so.] Next, as to the first and third pleas. It is a proper inference from the facts that the assignees *elected to take the lease. They clearly traded indirectly for the [*599 benefit of that part of the bankrupt's property. The hotel was closed; but a certain amount of business was done at the tap, by Smith, who must be considered either as their servant or their tenant. [COLERIDGE, J.—Not necessarily; he might be neither, and yet be supplied by their directions: and in that case his trading would not bind them.] They had control over him, so that his occupation was theirs: when the tap was closed, it was closed by their orders. They pay the taxes and the rent; they renew the license; they declare that they will resist an action of ejectment; and the premises are put up for sale by auction under their direction. All this is sufficient evidence, according to the principles laid down in *Welch v. Myers*, 4 Camp. 368, *Clark v. Hume*, Ry. & M. 207 (E. C. L. R. vol. 21), *Ansell v. Robson*, 2 Cr. & J. 610,† *Hanson v. Stevenson*, 1 B. & Ald. 803, and other cases, to show an acceptance of the lease by the assignees. Further, the defendants are, at all events, liable for use and occupation.

Sir *Fitzroy Kelly*, contrā.—First, as to the effect of the deed. No doubt it should be construed according to the intention of the parties; but Appleyard and Simpson must have been perfectly aware that, at the time when the deed was executed, which must be presumed to have been done with their consent, Masters had no power to convey more, and that the deed, as it stood, was inoperative to convey more, than the leasehold interest in the premises in question: they must therefore be presumed to have intended to accept such interest as *Masters then had. [*600 Lord CAMPBELL, C. J.—That is highly improbable, considering the price they had paid: unless you contend that the intention of the parties was that the conveyance of the leasehold interest should be effectual until the freehold was conveyed.] That may well have been. It is clear, at all events, that Appleyard and Simpson knew perfectly well that the deed could convey no more than the leasehold interest, and were content to take that at the time. They claimed, in the Bankruptcy Court, as mortgagees of other premises under the deed. [Lord CAMPBELL, C. J.—Yes: but they expressly disclaimed, afterwards, the leasehold interest in the Beulah Spa Hotel.] The assignees certainly thought that the leasehold interest was in Appleyard and Simpson; for they sent the key of the premises to them. [Lord CAMPBELL, C. J.—But the assignees paid the rent.] Next, as to the question of election. The defendants did not, as has been contended on the other side, carry on business on the premises, either directly or indirectly. [Lord CAMPBELL, C. J.—Taking possession of the premises would bind them, without that.] No doubt an entering and taking possession would bind them: but here they neither entered actually, nor did anything indicating a taking of possession. [Lord CAMPBELL, C. J.—They renew the license.] That was necessary, in order to prevent the property from deteriorating, while they were determining whether they should accept the lease. The cases which have been cited are not in point. In

Hanson v. Stevenson, 1 B. & Ald. 303, there was an actual entry and possession by the assignees. In Clark v. Hume, Ry. & M. 207 (E. C. *601] L. R. vol. 21), and *Ansell v. Robson, 2 Cr. & J. 610,† there was an open transaction of business on the premises by the assignees: and in Welch v. Myers, 4 Campb. 368, there was a deliberate act of adoption on their part. As to the premises being put up for sale by auction under the direction of the defendants, that was for the purpose of ascertaining the value of the property. Such an act does not necessarily amount to an election to take: Turner v. Richardson, 7 East 335. The present case is very similar to Wheeler v. Bramah, 3 Camp. 340. There the assignees suffered the bankrupt's effects to remain on the premises, and paid rent to avoid a distress; and afterwards they removed the effects and put up the lease for sale by auction: and it was held that these facts did not show an intention to take the lease. [Lord CAMPBELL, C. J.—Here the defendants did not pay the rent under protest, as in Wheeler v. Bramah. A protest would have been the obvious course, if they did not choose to take.] They had not yet had time to decide whether they should take or not. If the plaintiff wished to bring them to a decision at once, he should have applied to the Court of Bankruptcy for an order, under stat. 12 & 13 Vict. c. 106, s. 145.

Bovill was heard in reply.

Lord CAMPBELL, C. J.—With respect to the first point we are all of opinion that the lease of the premises remained in the bankrupt. The intention of the parties must be looked at in construing the deed; and we think it clear that it was not the intention of the parties here that *602] Appleyard and Simpson should become assignees of *the lease, but that it was intended that the deed should not operate until the fee simple of the premises had been conveyed by the plaintiff to Masters. Upon the question of election the Court will take time to consider.

Cur. adv. vult.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

At the argument we expressed a clear opinion, upon the first question submitted to us, that the lease of 6th June, 1853, and the term thereby created, was vested in Thomas Masters the bankrupt at the time of his bankruptcy: and we are now to give our opinion whether the defendants, the assignees of the bankrupt, are to be considered as having elected to take the said lease.

The result of the various cases upon this subject seems to be, that the assignees of the bankrupt are not liable as assignees of the term unless they have done some act which unequivocally indicates to the lessor that they have elected to take the benefit of the lease. No general rule can be laid down as to the effect of remaining in possession of the demised premises, or paying rent for them, or doing any other act consistent with the supposition that the assignees have not elected to take the lease as part of the property of the bankrupt for the benefit of the creditors. Each case must be determined by the peculiar circumstances belonging to it: and an examination of the decisions is only useful to get at the general principle by which they are governed.

Upon that principle, when we have looked at all the circumstances of *603] this case, we have come to the *conclusion that the defendants are not liable as assignees of the term.

In the first place, we must regard the extreme improbability that they should have taken to the lease, or should have been understood by the lessor to have done so. They knew that Barclay & Co. were the equitable mortgagees of the lease, and that if it was of any value it would be sold for the benefit of Barclay & Co. They knew that, by accepting the lease, they would render themselves liable for breach of the covenant to lay out 500*l.* upon the premises, and for breach of other covenants, in respect of which the arbitrator has awarded 1000*l.* damages against them if they are to be considered assignees of the term. Among these covenants there was one to keep the Beulah Spa Hotel open as an hotel during the whole term for which the lease was granted. But, while the defendants kept open the Crystal Palace Hotel, of which the bankrupt had a lease, they immediately closed the Beulah Spa Hotel; and they made no use of the Beulah Spa premises except for keeping upon them the furniture and goods which had belonged to the bankrupt. The case states that the tap of the Beulah Spa Hotel was kept open by a man who had before held it; but this was to preserve the license for the benefit of the property, to whomsoever it might ultimately come; and, with respect to the tap, the defendants do not appear to have done anything from which the plaintiff could reasonably have inferred that they meant to take to the lease. The length of the period during which the defendants continued in possession is immaterial, the object of their remaining in possession being for the custody of the furniture and goods. They submitted to a distress; and they paid the reserved rent which had *become due before the bankruptcy, and which became due [604 after the bankruptcy while they were in possession; but the plaintiff had a right to distrain, in whomsoever the term might be; and he was informed of the purpose for which the defendants wished to remain in possession.

The strongest finding in favour of the plaintiff is, that, on 29th June, 1855, Mr. Elmslie saw Mr. Pike and told him that he (Mr. Elmslie) should resist the ejectment: but, although this was after 20th June, when the goods had been removed, the ejectment had been commenced before the goods had been removed; so that Mr. Elmslie might only have meant that the ejectment could not be maintained, as, at the commencement of the ejectment, the assignees were lawfully in possession with the consent of the plaintiff: and we do not think that this vague statement is sufficient to throw upon the defendants the liability of assignees of the term.

At most, the circumstances relied upon by the plaintiff are equivocal; and, under such circumstances, we think it highly desirable that the lessor should avail himself of the power given by the salutary enactment in the 145th section of the Bankrupt Act, 12 & 13 Vict. c. 106, to apply to the Court of Bankruptcy that the assignees may be put to their election. The plaintiff might thus at once have got into possession of the demised premises; and this expensive litigation might have been entirely avoided.

For these reasons we think that the verdict should be entered for the defendants on the 1st and 3d pleas, and for the plaintiff on the 2d plea.

On the issue raised by the last plea we think that the verdict should be entered for the plaintiff, as the *defendant must be considered [605 liable to the plaintiff for the use and occupation of the premises from the quarter day up to which they last paid rent. Under this issue the arbitrator has assessed at 25*l.* 5*s.* Judgment accordingly.

The QUEEN v. ALFRED SEPTIMUS DOWLING, Serjeant at Law. Nov. 25.

Where an execution-creditor, under stat. 1 & 2 Vict. c. 110, s. 36, petitions the Court for the relief of insolvent debtors for a vesting order against a defendant charged by him in execution, that Court has, under stat. 10 & 11 Vict. c. 102, s. 10, power to make an order referring such petition to a judge of a county court, as well as in the case of a petition by the insolvent.

MACOUBREY, in last Term, obtained a rule calling on Alfred Septimus Dowling, the judge of the county court of Yorkshire, holden at York, to show cause why he should not hear and adjudicate in the matter of James Greenwood, on a petition and schedule transferred and transmitted from the Court for relief of Insolvent Debtors in Portugal Street, London, to him, the said Alfred Septimus Dowling.

The rule was obtained at the instance of Greenwood.

In this Term, (a)

Knowles and *C. E. Pollock* showed cause; and *MacOubrey* was heard in support of the rule.

The facts of the case, and the course of the argument, appear fully from the judgment. *Cur. adv. vult.*

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

*606] *This was a rule calling on the judge of the county court of York to hear an insolvent, named Greenwood, upon an order of reference from the Court in London. Greenwood was committed to York Castle in February, 1856, in execution for a debt, and removed to the Queen's Prison by habeas corpus. In October, a creditor petitioned for a vesting order, (b) which was issued. Thereupon Greenwood filed his schedule. An order for hearing in London was made; and, on the hearing, he was ordered to be taken back to York. An order of reference to the judge of the county court there was made, which he has refused to obey. The question is thus raised, Whether the Court in London has jurisdiction to make an order of reference to a judge of a county court in the matter of an insolvent, where the proceedings in insolvency originated in a petition by a creditor for a vesting order.

By stat. 10 & 11 Vict. c. 102, s. 10, it is enacted that the circuits of the commissioners shall be abolished after the 15th September, 1847, and that, if thereafter any insolvent debtor shall petition the Court for relief, or if any insolvent debtor shall have so petitioned, such Court "shall forthwith, after the schedule of such prisoner shall have been duly filed in the case of any new petition," and at any time which shall be thought fit in case of a petition theretofore presented, "make an order referring such petition" to a judge of a county court. These words, taken literally, apply to petitions presented by an *insolvent*, and do not expressly apply to petitions presented by a *creditor* against an insolvent.

*607] But, considering the purpose of this Act, and the context, *together with stat. 1 & 2 Vict. c. 110, we think that the intention of the Legislature to give jurisdiction in respect of *creditors'* petitions as well as *insolvents'* petitions sufficiently appears.

The purpose of this Act is to transfer, not to abolish, jurisdiction: the functions that were performed by the commissioners in Bankruptcy

(a) November 9th. Before Lord Campbell, C. J., Coleridge, Wightman, and Erie, J.

(b) Stat. 1 & 2 Vict. c. 110, s. 36.

and commissioners in Insolvency on circuit are in future to be performed by the county court judges. Thus, by sect. 4, all powers, &c., given to the Court of Bankruptcy in *matters of insolvency* by the Protection Acts shall be *transferred* to the Court for relief of Insolvent Debtors and the judges of the county courts: and, by sect. 6, the limits of the jurisdiction of the London Court and the county courts, respectively, are fixed. Under these sections, the transfer of all powers is complete, as far as relates to the Protection Acts. Sect. 10 relates to the transfer of the power theretofore vested in the commissioners in Insolvency on circuit, under stat. 1 & 2 Vict. c. 110, to the county court judges. The context shows that the transfer in this case was intended to be as complete as in the case before mentioned: but it was thought necessary to make a different provision for the petitions that should be presented after this Act came in force and those which had been presented before. The introductory hypothesis of an insolvent debtor presenting a petition after, or having presented one before, the Act passed is mentioned for the purpose of dividing petitions into *new* and *old*, not for the purpose of dividing petitions by *insolvents* from petitions by *creditors*. If the words of the section are confined to their literal meaning, the result would be that under a creditor's petition a vesting order might be made, depriving a debtor of all his *property and all means of paying [*608 his debts, but no relief from imprisonment could be given; which involves the absurdity of supposing the Legislature intended to act unjustly.

The language of the statute is remarkably inaccurate. The 10th section speaks of hearing the petition, whereas stat. 1 & 2 Vict. c. 110, provides for a hearing on the schedule; and there can be no hearing, in the sense intended by the 10th section, till after the schedule is filed. And the power to order gaolers to bring up debtors for hearing before the London Court or the county courts, as the case might be, is, in words, a power to bring debtors before the county court only. Inaccuracy of language in a statute is a ground for assuming that the literal meaning, if leading to an absurdity, does not express the intention of the Legislature, and requires the Court to seek another meaning, not inconsistent with the language used, from the context and purpose of the Act.

For the purpose of the Legislature in this section, it is immaterial whether the insolvent or the creditor has petitioned: the time of presenting is alone material: and, though the example is put, If an insolvent petitions, the meaning is, If a petition is presented. This construction is fortified by referring to stat. 1 & 2 Vict. c. 110, s. 36, creating the power for creditors to petition for vesting orders. If the vesting order is made thereon against an insolvent, the enactment is, that a further order shall then be made for the insolvent to file a schedule therein; and then he is to be brought up for hearing: "and all things" are "to be done thereupon or *preparatory thereto* as in other cases according to this Act;" that is, as in case of petitions by insolvents. The *Act provides for hearing the insolvent after a schedule has been [*609 filed on his own petition, and then provides for a creditor's petition: and, if the insolvent files a schedule thereon, the procedure for a hearing thereon is to be the same as in the case of an insolvent's petition. Stat. 1 & 2 Vict. c. 110, and stat. 9 & 10 Vict. c. 102, s. 10, are

to be read together: it is clearly necessary to take power under stat. 1 & 2 Vict. c. 110, to enable the London Court to order a gaoler to bring a prisoner up in London under stat. 9 & 10 Vict. c. 102: and we see no reason why the London Court should not take power from sect. 36 to do all things relating to a hearing after a creditor's petition, which it is authorized by either Act to do for a hearing on an insolvent's petition.

The 10th section has been repeatedly under consideration in the Court for the relief of Insolvent Debtors: and in the matter of Charles Race the Chief Commissioner has given a clear and powerful judgment, (a) deciding that an order of reference may be made for the hearing of insolvents who have filed schedules where a creditor has petitioned for and obtained a vesting order. With that judgment we concur: and we think that an order of reference may be made to a judge of a county court as was done in this case. It follows that the rule should be made absolute.

Rule absolute.

(a) Cited in the argument from The Law Times Reports of May 3, 1856, vol. 27, p. 83. Reference was also made, in the course of the argument, to *Ex parte Phillips*, 2 E. & B. 192 (E. C. L. R. vol. 75), and to *Fordyce v. Bridges*, 1 H. L. Ca. 1, 4.

*610] *The QUEEN v. The Provost of the College Royal of The Blessed MARY of ETON, and the same College, and JOHN ALEXANDER CLARKE, Clerk. Nov. 25.

The right of the Crown to present to an English benefice upon the appointment of the incumbent by the Crown to a bishopric is not barred by the Crown having, before such appointment, granted the advowson to a subject.

But no such right exists in the case of an appointment to the bishopric of Christchurch in New Zealand.

QUARE impedit, at the suit of The Queen, for the presentation to the Church of Stratford Mortimer, in Berkshire.

By the declaration, the Attorney-General alleged that heretofore, to wit, on 10th September, 1840, (a) the said Provost and College, being seised in fee of the advowson of the said church of Stratford Mortimer, did present thereto the Reverend Henry John Chitty Harper, their clerk, who, on such presentation, was duly admitted, instituted, and inducted into the same. And the said church afterwards, to wit, on 10th August, 1856, became vacant by the appointment, by our said Lady the Queen, of the said H. J. C. Harper to be Bishop of the Bishopric of Christchurch in the colony of New Zealand, the same being within and part of the dominions of our said Lady the Queen, and by the consecration of him the said H. J. C. Harper as such bishop. Whereby it then belonged, and now belongs, to our said Lady the Queen to present a fit person to the said church, so being vacant as aforesaid. But the said Provost and College, and the said John Alexander Clarke, unjustly hinder our said Lady the Queen from presenting a fit person to the said church. Whereupon the said *Attorney-General says

*611] that our said Lady the Queen is prejudiced, &c.
Plea, by the Provost and College. That our said Lady the Queen ought not to sue the said Provost and College in this behalf, because

they say that the late Sovereign Lord, Henry the Sixth, late King of England, in the 24th year of his reign, to wit, on the 5th day of March in the year of our Lord 1445, to wit, at Westminster, in the county of Middlesex, was seised in his demesne as of fee, in right of his Crown of England, of the said advowson, the same then being annexed and appendant to the priory of Stratford Mortimer in the county of Southampton, being a priory of aliens, whereof the said King was then seised in his demesne as of fee in right of his said Crown and parcel of the possessions thereof. And, being so seised, the said King then, to wit, on the day and year last aforesaid, at Westminster aforesaid, in the county aforesaid, by his certain charter and letters patent under His Great Seal of England, and then enrolled of record in the said King's Court of Chancery, and by the assent and authority of the Lords Spiritual and Temporal and the Commons, then in Parliament assembled, granted to the said Provost and College, and their successors, the said priory of Stratford Mortimer, with the appurtenances, and divers other priories, manors, lands, tenements, and hereditaments, whereof the said King was then so seised as aforesaid, and in the same charter and letters patent more particularly mentioned: to have and to hold the same, and all other the said priories, lands, tenements, and hereditaments in the said charter and letters patent mentioned as aforesaid, together with all and singular advowsons of churches and other ecclesiastical benefices, *to the said priories, manors, and possessions,(a) [*612 knights' fees and other appurtenances whatsoever to the said Provost and College and their successors, for increase of their maintenance, and in free, pure, and perpetual alms for ever, without anything to be rendered to the said King or his heirs for the same; the statute of not putting lands and tenements in mortmain, made and published, or for that express mention of the true value of the premises or any of them, or of other gifts or grants to the said Provost and College and their successors, or to any of their predecessors and their successors, before that time made, according to the form of the statutes in such cases made in the said charter and letters patent did not appear, notwithstanding. And, by the same charter and letters patent, the said King did, by the assent and authority aforesaid, further grant that the said Provost and College, and their successors, for ever, should have and hold all and singular the lordships, lands, tenements, fees, and possessions to them then thereby given, and by himself, his heirs or successors thereafter to be given, free, quit, and discharged of all and all manner of charges, rents, services, annuities, apportionments, farms and arrearages of farms, and apportionments, exactions, and demands to the said King, his heirs or successors, in any ways belonging or appertaining, and which from them, by reason or cause of the said lordships, lands, tenements, fees, and possessions, to the said King, his heirs or successors, did or might belong or appertain, without anything to the said King, his heirs or successors, to be paid or done for that the charges, rents, services, exactions, annuities, apportionments, farms, arrearages, and demands aforesaid, in the said charter and letters patent by special words were not *expressed, or for that the lordships, lands, tenements, and fees aforesaid, or any parcel of them, were theretofore [*613

(a) [Annexed and appendant?]

the priories or possessions of aliens, for that also, by authority of the Parliament held at Leicester in the time of the Lord Henry the said King's father, late King of England, it was ordained that all possessions of priories of aliens, except priories conventual and others in a certain Act of the same Parliament excepted, should remain to him and his heirs under a certain manner in the same Act contained, or for that the peace between the kingdom of England and France has or might be renewed, or for that in the said charter and letters patent mention was not made of the true value of all and singular the premises, or of any the gifts or grants therein aforesaid by the said King to the said Provost and College, or to any of their predecessors, before that time made, according to the form of the statutes, or any omission, variation, or superfluity of naming or reciting of the previous lordships, lands, tenements, fees, and possessions aforesaid, or of any of them, made or thereafter to be made in any manner, or any other right, title, or interest, which to the said King therein did accrue, or to the said King, his heirs or successors, thereafter might accrue, or the statute made of not putting lands and tenements into mortmain, or any other statutes or ordinances made, or to be made, concerning such priories and possessions of aliens, notwithstanding. And, moreover, by the said charter and letters patent, the said King did, by the advice, assent, and authority of the then present Parliament, for himself, his heirs and successors, will and grant that, upon producing or showing of the said charter and letters patent, and *614] of every clause thereof concerning the gifts, *confirmations, releases, quit-claims, of the priories, houses, lordships, manors, lands, tenements, fees, possessions, rents, reversions, services, farms, annuities, advowsons, pensions, portions, fee-farms, apportionments, liberties, franchises, privileges, acquittances, and annuities aforesaid, by the said King to the aforesaid Provost and College and their successors in form aforesaid thereby granted, or of the enrolment thereof of record in the said King's Court, or of the exemplification thereof, and of every clause thereof, as well before the said King in the Chancery of the said King, his heirs and successors, as before the Justices of either Bench, and as well before the Treasurer and Barons of the Exchequer of the said King, his heirs and successors, as before whatsoever Justices and Commissioners of the said King, his heirs and successors, as well in all and singular Courts and places of the said King, his heirs and successors, as in all other Courts and places throughout the said King's realm of England aforesaid, for any thing or things in the said charter and letters patent contained or specified, the said charter and letters patent should be to the said Provost and College and their successors allowed. And that they, the said Provost and College, and their successors, from all and all manner of charges and demands concerning the said donations, grants, confirmations, releases, quit-claims, liberties, franchises, privileges, acquittances, and annuities aforesaid, in such Courts and places upon them charged, by virtue of producing and showing of the said charter and letters patent, from the said King, his heirs and successors, and free from all others, should freely depart without delay or any further process thereupon to be prosecuted. As by the said charter, *615] and letters patent, *sealed with the said King's Great Seal of England, which the said Provost and College now bring here into Court, and the date whereof is a certain day and year therein in

that behalf mentioned, to wit, the same day and year first aforesaid, to wit, at Westminster aforesaid, in the county of Middlesex aforesaid, more fully appears. And which said charter and letters patent, afterwards, to wit, on the day and year aforesaid, to wit, at the Parliament holden at Westminster aforesaid, in the said county of Middlesex, in the 23d and 24th years of the reign of the said King Henry 6th, was, by the authority of the same Parliament, and by a certain Act of Parliament then made in that behalf, for the said Provost and College, duly confirmed, ratified, approved, and enacted. As by the record of the said Act of Parliament, remaining amongst the rolls of Parliament at Westminster aforesaid, in the same county, more fully and at large appears. And the said Provost and College further say that they then and there became and were seised in fee of the said advowson of the said church of Stratford Mortimer, as in the declaration in that behalf alleged, under and by virtue of the said Royal charter and letters patent so ratified and confirmed as aforesaid: and that, ever since the granting of the said charter and letters patent by the said King Henry 6th, in manner aforesaid, they have been, and before and at the said several times in the said declaration mentioned they were, and still are, under and by virtue of the said charter and letters patent of the said King, so ratified and confirmed as aforesaid, seised in fee thereof as aforesaid. And, being so seised of the said advowson, and under and by virtue of the said Royal charter and letters patent, after the said church had so become vacant by the said appointment *and consecration of the said Henry John Chitty Harper, as in the said declaration in [*616 that behalf mentioned, and before the commencement of this suit, to wit, on the 11th day of August in the year of our Lord 1856, they, the said Provost and College, duly presented the said John Alexander Clarke, their clerk, to the said church. Who, upon the same presentment, was thereupon afterwards, to wit, on the day and year last aforesaid, to wit, at Stratford Mortimer aforesaid, in the said county of Berks, duly admitted, instituted, and inducted into the same, as the perpetual vicar and incumbent thereof. And the said John Alexander Clarke has ever since been, and still is, the vicar and incumbent thereof as aforesaid. Without this that, by the said appointment and consecration of the said Henry John Chitty Harper, as in the said declaration mentioned, it then belonged, or now belongs, to our said Lady the Queen to present a fit person to the said church in manner and form as in the said declaration is in that behalf alleged. Conclusion to the country.

Plea, by John Alexander Clarke. That he is vicar of the vicarage of the said church of Stratford Mortimer, and the incumbent thereof, by virtue of the presentation, admission, institution, and induction herein-after mentioned. And that our said Lady the Queen ought not to sue him in this behalf: because he says that true it is that, on the said 10th day of September in the year of our Lord 1846,(a) the said Provost and College, being then seised in fee of the said advowson of the said church as in the declaration mentioned, did present to the said church the said H. J. C. Harper, their clerk, who, upon such presentation, was duly admitted, instituted, inducted into the same, as in the said declaration

*617] *also mentioned. And that the said church afterwards, to wit, on the said 10th day of August in the year of our Lord 1856, became vacant by the said appointment by our said Lady the Queen of him the said H. J. C. Harper to be Bishop of the said Bishopric of Christchurch in the colony of New Zealand, and, by the consecration of him, the said H. J. C. Harper, as such Bishop as aforesaid, as in the said declaration is in that behalf alleged. But, nevertheless, for plea in this behalf, the said J. A. Clarke says that the said Bishopric of Christchurch was and is a Bishopric lately erected and constituted, and situate wholly in parts beyond the seas, and not within any part of the United Kingdom of Great Britain and Ireland. And that, by reason thereof, after that the said church of Stratford Mortimer had so become vacant as aforesaid, and before the commencement of this suit, to wit, on the 11th day of August in the year of our Lord 1856, the said Provost and College, who, both before and at and ever since the time when the said H. J. C. Harper was so presented thereto as aforesaid, had been and were, and then, to wit, on the day and year last aforesaid, were and still are, seised in fee of the said advowson, and the rightful patrons of the said church, presented him, the said J. A. Clarke, their clerk, to the said church: Who, upon the same presentment, was afterwards, to wit, on the day and year last aforesaid, to wit, at Stratford Mortimer aforesaid, in the county aforesaid, duly admitted, instituted, and inducted into the same, as the perpetual vicar and incumbent thereof. And that he thereby then became and was, and has ever since been, and still is, the perpetual vicar and incumbent of the said vicarage and church. Without this, &c. Conclusion as in the other plea.

*618] *Demurrer to both pleas. Joinder on both demurrers.

The case was argued in last Trinity Term.(a)

Sir *R. Bethell*, Attorney-General, for the Crown.—The first question, which arises on the declaration, is, whether the Crown, upon appointing, to the colonial bishopric of Christchurch in New Zealand, a clerk who holds a benefice in England, acquires the right of presenting to such benefice. No reason appears for distinguishing a colonial bishopric, in this respect, from a bishopric in England: and it will not be questioned that the Crown possesses this right in the case of the appointment to an English bishopric. The prerogative originates in the supremacy of the Crown; and the Crown is no less supreme in the case of a colonial bishopric than in that of any other. The ordinary view, as to the origin of this right, is that it was formerly exercised by the bishop of Rome as head of the church; and that it is in the Crown, by stat. 26 H. 8, c. 1, which enacts that the King shall be taken, accepted, and reputed the only supreme head on earth of the Church of England, and shall have and enjoy all privileges, &c., to the said dignity of supreme head of the same Church belonging and appertaining. The correctness of this view, though it is perhaps not important to the present question, may be open to doubt: the prerogative of the bishop of Rome was disputed by the Crown in much earlier times, as, for instance, in the Statutes of Provisors, 6 stat. 25 Ed. 3, and 1 stat. 27 Ed. 3, c. 1; and the more sound view appears to be that stat. 26 H. 8, c. 1, was, as to the supremacy of the Crown, only declaratory. In 2 Bro.

(a) May 29, 1857. Before Lord Campbell, C. J., Coleridge and Erle, J. Crompton, J., left the Court during the argument for the defendants.

*Abr. 151 *a*, *Presentacion al Esglise*, pl. 61, Brooke says: "Nota que levesque de Ely dit al moy, q'il vey un presentation tempore [619 Reg. E. 3, fait p'le dit Roy, q'il p'sent al un benefice p' illa vice, q' fuit dauter patronage per hec v'ba ratione prerogative sue, q'l benefice void', ratione q' le roy auoit fait lencūbent de ceo un evesque, q' fuit sacre, issint q' quant benefices veigne void' per feisans dun encumbent evesque, le roy p'senter al tous ses p'mer benefices pro illa vice, quicūq. q' soit p'ron de ceo, q'd nota. (5 Marie)." And in *Doctor and Student*, Dial. II. c. 36 (p. 218, 9, ed. 17), the prerogative of the Crown is treated of as existing at common law. [COLERIDGE, J.—That authority does not appear to go further than establishing that the presentment to the bishopric vacates the benefice.] In *Wright's Case*, Moore 399, it was held that Queen Elizabeth had the right of the presentation to a benefice the incumbent whereof was created bishop of St. Asaph. The language there is: "la roigne est d'aver le p'sentacōn lou l'esglise est void par cession, et nemy le patron." "Cession" is clearly here applied to an avoidance by the promotion to a bishopric. The expression is used in the same way in *Sidney v. Bishop of Gloucester*, 2 Dyer 228 b, a case in 6 Eliz. There, however, Dyer says that he and his companions thought it was not law that the benefice belonged to the Queen by her prerogative when it was void by the creation of the incumbent into a bishop. But in the note cases are given, from the reigns of Ed. 3, Ja. 1, and C. 1, clearly affirming the prerogative: one in 24 Ed. 3, where the claim was to present to a prebend upon the prebendary being created archbishop of Dublin; and another in 3 C. 1, laying down *the [620 same law if a parson or dean in England take a bishopric in Ireland. In *Troward v. Cailland*, 6 T. R. 439, (a) Grose, J., says, of the case in Ja. 1, that "it cannot be doubted that there was some case to the effect there stated." In *Woodley v. Bishop of Exeter*, Cro. Jac. 691, S. C. Winch 94, the King promoted a clerk, who held a benefice in England, to a bishopric in Ireland: and he granted to the bishop to hold the benefice in commendam for six years: the plaintiff, who was grantee of the first and next avoidance, claimed to present upon the death of the bishop. A difference of opinion appears to have existed among the Judges as to the King's right of presenting to a benefice made void by promotion to a bishopric: but it seems to have been taken for granted that there was no difference, in this respect, between an English and an Irish bishopric, though the benefice was English. The Court decided against the plaintiff, considering that he had lost his turn by the grant of the Crown. In Croke's report it is said: "But for the interest which the King hath to present, when the incumbent is created a bishop, after consecration; Winch held, that the King hath an absolute title by his prerogative, as well in case where a common person hath the patronage, as where the king hath it: and he is not only as immediate patron, or supreme patron, because the incumbency being void by his creating of him bishop, he hath it by his prerogative. And many sorts of precedents, since the time of K. H. 8 were by him cited, where the incumbent was created bishop in England or Ireland, that such presentments *have been ratione prerogativæ, and not as [621 patron." This view agrees with that in the note to 2 Dyer 228 b,

(a) Affirming the judgment of the Common Pleas in *Cailland v. Troward*, 2 H. Bl. 324. Judgment of Q. L. affirmed in Dom. Proc., 6 T. R. 778.

as far as the present question is concerned; though the result as to right of the grantee of the avoidance seems not to agree. The prerogative of the Crown appears from the creation of the new bishoprics by Henry 8. [COLERIDGE, J.—I think the power was given to him by statute.(a)] The bishops of the new dioceses of Manchester and Ripon are appointed by letters patent. [Lord CAMPBELL, C. J.—Under stat. 6 & 7 W. 4, c. 77, s. 12. COLERIDGE, J.—Do you say that the Sovereign can make a bishop?] The Crown can create a bishop: but, for the purposes of endowment, an act of the Legislature would be requisite. Thus, in stat. 53 G. 3, c. 155, s. 49, it is enacted: "That in case it shall please His Majesty, by His Royal letters patent under the great Seal of the said United Kingdom, to erect, found, and constitute, one bishopric for the whole of the said British territories in the East Indies, and parts aforesaid; one archdeaconry," &c.: and then salaries are assigned. In the case of the colonial bishoprics, as was pointed out by Coleridge, J., in *Regina v. Archbishop of Canterbury*, 11 Q. B. 483, 609 (E. C. L. R. vol. 63), "the sees have been created in the colonies, and the bishops appointed, not under any acts of the Legislature, but by the exercise of the Royal Prerogative alone." In some instances the Legislature has added an endowment; but even that has not been done in the case of the New Zealand bishopric. In *Basset v. Gee*, Cro. Eliz. 790, 42 Eliz., it was *admitted (though the case was decided on a pleading point) that the creating a clerk, having a benefice in England, a bishop in Ireland, was a cause of avoidance, and that the Queen should have the presentation to the benefice "by her prerogative." The Church of Ireland was then distinct from the Church of England: but the colonial bishops appear to be in the position of suffragan bishops to the Archbishop of Canterbury. [Lord CAMPBELL, C. J.—Is that so? Do they sit in Convocation of the Province of Canterbury? COLERIDGE, J.—I believe it was determined, in Convocation, that they could not do so.(b) The bishopric of New Zealand is now comprehended in another province, that of the Archbishop of Sidney. Lord CAMPBELL, C. J., referred to stat. 26 G. 3, c. 84.] The Convocation of Canterbury, as at present constituted, had no right to determine the question. In *Attorney-General v. Bishop of London*, 4 Mod. 200, in K. B.,(c) the prerogative was upheld, in both this Court and the House of Lords; and the case was a very strong one; for one of the benefices there in question, that of St. James's (claimed by Dr. Birch), had been created by statute, 1 Ja. 2, c. 22, which named the first incumbent, and gave the patronage, after his decease or avoidance, to the Bishop of London and Lord Jermyn by turns: yet, upon the first incumbent being created a bishop, it was held that the Crown should present by its prerogative. And the case is still stronger because the Crown had appointed two successive incumbents to bishoprics, and claimed the presentation to the benefice, toties quoties, thus postponing *623] indefinitely the patron's right. *The claim of the Pope in earlier times seems to be asserted in the *Extravagantes Comm. Lib. III. tit. 2, c. 13*. In *Evans v. Ascuithe*, Palm. 457, S. C. Noy 93, though

(a) Stat. 31 H. 8, c. 9. This statute was repealed by stat. 1 & 2 P. & M. c. 8, ss. 18, 20; but by sects. 26, 33, the bishoprics created are continued. And see stat. 34 & 35 H. 8, c. 17, s. 2.

(b) See *Synodalia* for March, 1853, p. 306, ix., x., xi.

(c) Affirmed in Dom. Proc., *Bishop of London v. Attorney-General*, Show. Ca. Par. 164.

the question now before the Court was not directly under consideration, there occur expressions affirming the right of the Crown, in the case of promotion to an Irish bishopric, in the most positive terms. An opinion was given, December 10th, 1851, by Sir John Dodson, Queen's Advocate, Sir A. J. E. Cockburn, Attorney-General, and Sir W. P. Wood, Solicitor-General (in consequence of a suggestion made to the Lords of the Treasury by Lord Truro, C.), that, upon the appointment to the Bishopric of Bombay(a) of a clerk holding an English benefice, the Crown is entitled to present to the benefice. It is true that, on March 4th, 1844, an opinion was given to the Home Secretary, Sir J. R. G. Graham, by Sir John Dodson, Queen's Advocate, Sir F. Pollock, Attorney-General, and Sir W. W. Follett, Solicitor-General, that, generally, the Crown had not a right, in the case of colonial bishoprics generally, so clear as to make it advisable to press the claim. But the assertion of the claim, in the case of the appointment to the Bishopric of Bombay, has been submitted to. [Lord CAMPBELL, C. J.—Perhaps from prudential motives.] Blackstone, in 1 Com. 383, lays the law down in the most general terms: "I may here mention, once for all, that if a dean, prebendary, or other spiritual person be made a bishop, all the preferments of which he was before possessed are void; and the King may present to them in right of his prerogative royal." [COLERIDGE, J.—Did that apply in the case of suffragan bishops made under stat. 26 H. 8, c. 14? Sir F. Thesiger, *for the Provost and College.—It did not, according to Mallory, *Quare Impedit*, i. p. 113.] In 2 Gibson's Codex, p. 763 (2d ed.), it is said: "Upon promotion of any person to a bishopric in England or Ireland, the King hath right to present to such benefices or dignities, as the person was possessed of before such promotion; though the advowson belongs to a common person:" which right he deduces from the practice of the Popes, expressed and confirmed in the bull of Pope Benedict, A.D. 1335. If the prerogative of the Crown be considered to be derived from the former privilege of the Pope, the right will not the less vest, in the present case, in the Crown, which now has the full power formerly exercised by the Pope. [Lord CAMPBELL, C. J.—If an Englishman, holding a benefice here, were made a bishop in Spain, could the Pope present to the vacant benefice? Or could the Crown present, if the clerk were made a bishop in Scotland?] The right can of course not accrue when the power of the Crown is limited.

Secondly, it will be contended for the defendants that, even supposing the Crown to have in general the right now contended for, the grant of the advowson to the College by the Crown takes away the right, since otherwise the right would operate in derogation of the grant. [Lord CAMPBELL, C. J.—On that point we will wait to hear the argument on the other side.]

Sir F. Thesiger (for the Provost and College), *contra*.—Whatever prerogative the Crown has as to the presentation to benefices vacated by appointments to bishoprics is one of strict law, and not held for the advantage of the subject: it will therefore not be extended. Many attempts have indeed been made to assign a reasonable *ground for it, but none successfully. According to Levinz's report of [*625

(a) See stat. 3 & 4 W. 4, c. 85, s. 89.

the case cited on the other side, *Attorney-General v. Bishop of London*, 3 Lev. 377, Cowper, Solicitor-General, said "it is reasonable when the King presents a parson to a bishopric, that he should have the presentation to his parsonage;" to which Levinz answers: "If what is said be a reason, by the same reason if the King promotes my chaplain of my family, or my bailiff, or other servant, he may impose another upon me." The same case is very fully reported in Shower (1 Show. 413, 441, 493, 501.) S. C. 1 Ld. Raym. 23. Wright's Case, cited on the other side from Moore, (Moore 399), is reported in Croke as *Wentworth v. Wright*, Cro. Eliz. 526: and the counsel for the presentee of the Crown is there reported as saying: "Although it is said, that this prerogative cannot be proved by reason, this is not material, nor ought there any reason to be given, or inquired about the Queen's prerogative." But afterwards he says: "There is great reason also for this prerogative: for the Queen hath advanced the incumbent to a great dignity; and it is her great loss to part with the temporalities of the bishoprics. She was also the means to cause the avoidance of this benefice. And it is an usual practice, that the Queen for the most part, upon creating of bishops, grants unto them to hold their benefices in commendam which is good against the patrons; because the presentations belonged unto her. And that is as great a prejudice to the patron, as if the Queen herself had presented thereto." This is sufficiently answered by the passage before cited from the argument of Levinz.

*626] As to the passage from 2 Gibson's Codex 763, the errors *in it are numerous. It is there stated that "the King is patron paramount of all livings;" which is not true. There is no authority for supposing that in fact the Pope, upon a clerk being presented to a bishopric, presented to a benefice previously held by the clerk where the patronage was in lay hands. Spiritual patrons might be considered as the Pope's servants; and the bull claims no more: and the prerogative seems to have first been claimed after the Reformation, and to have been insisted upon in imitation of encroachments formerly made, in the case of spiritual persons, by the Pope: *Wentworth v. Wright*, Owen 144. But it is now too late to dispute that the Crown, wherever it presents to an English bishopric a clerk having an English benefice, has the presentation to the benefice. The early state of the law appears in 2 Rol. Abr. 343, *Presentment* (C), pl. 3. "Si le Roy create un incumbent del common parson un evesque le patron presentera et nemy le Roy." He then cites several old authorities. But he adds: "Mes la ley est auterment ore generalment prise et agree, scilicet que le Roy avera le presentment. Contrà H. 29 El. B. R. Holland's Case." The case last referred to is apparently *Armiger v. Holland*, Cro. Eliz. 542, 601, in 39 Eliz. The question there before the Court of King's Bench was not the general right of the Crown to present on an avoidance by cession; but, a doubt as to the law upon such avoidance having been suggested, the opinion of the Bench seems to have been expressed in favour of the prerogative. The authority of the placitum from 2 Bro. Abr. 151 a, *Presentation al Esglise*, pl. 61, is doubtful: in *Rex v.*

*627] *Bishop of London*, 1 Show. 458, it was pointed out, *in argument, that *Winch*, (a) in *Woodley v. Bishop of Exeter*, *Winch*

94, ridiculed the opinion of the Bishop of Ely, which Brooke cites. The case is also noticed in Mallory^(a) and in Watson's Clergyman's Law, ch. 9, p. 74 (4th ed.). In Owen's report of *Wentworth v. Wright*, Owen 144, it is said that Walmesley cited a case in the time of Ed. 2, where it was "adjudged, that the patron shall present and not the King." Search has been made for this case: but it has not been found. But in Maynard's Ed. 2, (1312), the pleadings in a case of *Rex v. Howat*, Maynard's Edw. 2, 140, M. 5 Ed. 2, are set out. There the Crown brought *quare impedit*, claiming title to the advowson as grantee from a subject, and, in tracing the presentments, showed an avoidance upon the appointment of the clerk to a bishopric, and a presentment thereupon by the subject through whose grant the Crown claimed. What was decided in *Bassett v. Gee*, Cro. Eliz. 790, was that the Crown, if it passes over its turn, cannot present. And in *Rex v. Bishop of Salisbury*, Yearb. M. 11 H. 4, pl. 67, fol. 37 A., P. 11 H. 4, pl. 10, fol. 59 B., T. 11 H. 4, pl. 18, fol. 76 A, where an incumbent of a benefice in the gift of a bishop was created a bishop, the Crown claimed the presentment, not as of prerogative, but as being in possession of the temporalities of the episcopal patron; and afterwards the Crown declared afresh, and claimed under the Statute of Provisors, 6 stat. 25 Ed. 3. This case is cited in 2 Bro. Abr. 149 b, *Presentacion al Esglise*, pl. 14, where it is said that some say the Crown shall present when the incumbent is made a bishop, in whosoever patronage the *benefice is. In the argument for the defendant in *Rex v. Bishop of London*, 1 Show. 458, many instances of presentation [*628 by the Crown are explained: and it seems that in the early cases they turn out to be presentations to benefices of which the Crown was patron, either in its own right, or by having seisin of the temporalities of the bishop who was patron. Stress has been laid upon the note in *Dyer*, (2 *Dyer*, 228 b), as showing that the prerogative was early in force. But in *Rex v. Bishop of London*, 1 Show. 467, Lord Holt states that the point appears from that note to have been formerly doubtful, but to have been settled finally in favour of the Crown by *Wright's Case*, Moore, 399.(b) *Woodley v. Bishop of Exeter*, Cro. Jac. 691, S. C. *Winch* 94, is also referred to by Lord Holt, as showing that there had been a doubt upon the point. The reports of that case are not quite consistent, as to the opinion of *Winch*. In *Troward v. Cailland*, 6 T. R. 439, 778,(c) the general law, no doubt, appears to be clearly settled. But, as to the principle, there appears to be some weight in the remark of *Dolben, J.*,(d) that, if the Crown has the prerogative, "there is no one that has a great living, but will present a blockhead that is not likely to be made a bishop, to preserve his presentation." The discussion which there took place on the Bench shows that the prerogative was still in dispute. In *Doderidge's Compleat Parson*, lect. 16 (A. D. 1602, 3), p. 95, the right of presentation is spoken of as being in the patron. Thus far *as to the right of the Crown in the case of [*629 an English bishopric, which, it may be admitted, is now established on the ground of precedent. As to bishoprics not in England,

(a) Mallory's *Quare Impedit*, 64. Of Presentations (E), pl. 3, note (b).

(b) S. C. as *Wentworth v. Wright*, Cro. Eliz. 526; Owen 144.

(c) Affirming *Cailland v. Troward*, 2 H. Bl. 324.

(d) In *Rex v. Bishop of London*, 1 Show. 470.

it appears from passages in *Evans v. Ascuthe*, Palmer 457, S. C. Noy 93, that the appointment of a clerk, beneficed in England, to an Irish bishopric, avoids the benefice. In *Basset v. Gee*, Cro. Eliz. 790; this was also admitted; but the decision was on another point. In *Woodley v. Bishop of Exeter*, Cro. Jac. 691, S. C. Winch 94, the avoidance, upon which the question arose, was created by a presentation to an Irish bishopric. But in 4 Inst. 356, 7, it is said that in such a case the Crown would have the presentation to the vacated benefice only when the Crown was, at the time, patron of the benefice. And it appears that there is an inaccuracy in the report of *Evans v. Ascuthe*, Palmer 457, S. C. Noy 93; for there the right of the Crown seems to be treated as existing at common law, whereas, from the recital of the Irish statute 17 & 18 C. 2, c. 10, s. 1, it appears to have been not before then settled that an English benefice was even avoided by the promotion to an Irish bishopric. And no decision has ever been pronounced directly on the point. But, recently, the present Archbishop of Dublin vacated a benefice in England by his appointment to that see: and the Crown, after claiming the presentation, withdrew; and the patron presented. Then, as to colonial bishoprics: the Crown has no prerogative to create such a bishopric without authority of Parliament. Besides, the colonial bishops may hold benefices in England. Nor could any appointment by the Crown give the bishop any authority in the colonies: and the voluntary acquiescence in such authority no more *630] constitutes an actual power than the acquiescence by Roman Catholics in the authority of the Pope, a fact acknowledged to be consistent with the oath that the Pope has no such power. The colonial bishop is in the nature of a suffragan, as is suggested on the other side; and no case can be found of the Crown presenting to a benefice vacated by appointment to a suffragan bishopric. [COLERIDGE, J.—By stat. 26 H. 8, c. 14, s. 1, the suffragan bishops were created by the bishop presenting two, of whom the Crown selected one. Sir R. Bethell, Attorney-General.—And that one was presented to the metropolitan, sect. 3: and sects. 7 and 8 show that the suffragan might retain his benefice.] The Crown, at the utmost, can make only a titular bishop in the colonies, except by statutory enactment.

Secondly, as to the plea. The Crown has granted absolutely to the College the priory to which the advowson is annexed. The power now claimed could be exercised only in derogation of such grant. It may be argued that the grant must be taken as made subject to the ordinary incidents of such property. But, as appears from the authorities cited, the incident now in question did not attach in the reign of H. 6, the time of the grant. [Lord CAMPBELL, C. J.—The right was not given by statute: and we must understand the authorities, if they decide that the power exists at all, as deciding that it always existed.] The Crown may be considered as covenanting for quiet enjoyment. That the Crown cannot derogate from its own grant of an advowson appears from *The Queen and Middleton's Case*, 1 Leon. 44, cited in 17 Vin. Abr. 323, *Presentation* (F. a, 2), pl. 9.

*631] Sir R. Bethell, Attorney-General, in reply.(a)—It is true that the prerogative ought not to be extended: the question is,

(a) *Badeley* appeared for the defendant Clarke, but stated that the cases of the several defendants depended upon the same questions: and it was agreed that no additional argument should be heard.

whether the prerogative now claimed be not identical with that which has been allowed. A stronger case than that of Attorney-General *v.* Bishop of London, 4 Mod. 200, in K. B.,^(a) can hardly be imagined. A suffragan bishop has authority only within the limits of that of the existing bishop, and after the death of the latter would be only a titular bishop, like the English bishops who have resigned their sees. A colonial bishop is not a titular bishop. It is not necessary to show, on behalf of the Crown, that there is in New Zealand an establishment answering to that of the Church of England and Wales. The case of the Irish Church, which was separate from the English Church, supplies as strong an analogy as is requisite. The language of the bull cited in 2 Gibson's Codex 763, shows that Gibson was right in his view of the assumption made by the Pope; and the Statute of Provisors, 6 stat. 25 Ed. 3, insists upon a similar right in the Crown long before the Reformation. There is no statutory power given by the Legislature to create a bishopric in New Zealand; nor was any requisite: the validity of the grant by the Crown is, however, recognised in stat. 15 & 16 Vict. c. 88.

As to the second point. [Lord CAMPBELL, C. J.—We will not trouble you to reply on that: the claim is not in derogation of the grant.]

Cur. adv. vult.

*Lord CAMPBELL, C. J., now delivered the judgment of the [632 Court.

From the great importance and the novelty of the main question raised in this case we have taken time to consider it very deliberately, after the able argument addressed to us upon it by the Attorney-General on one side and Sir *Frederick Thesiger* on the other.

There can be no doubt that, on the promotion of the incumbent of a benefice in England to a bishopric in England, the benefice is avoided, and it belongs to the Queen to present to the benefice so avoided. This is clearly a prerogative of the Crown, whatever may have been the reason for it, and however it may have been acquired. It rests upon uniform usage, and is supported by so many dicta of our text writers, and decisions of our Courts of Justice, that it cannot now for a moment be questioned.

The prerogative is stated likewise to extend to the bishopric of Sodor and Man, not within the realm of England, although held under the Crown of England, that see having been immemorially a see of the Church of England, anciently attached to the province of Canterbury, and more recently to the province of York.

Whether the prerogative likewise extends to the case of an English incumbent promoted to a bishopric in Ireland has been considered a question of grave doubt. In Mallory's *Quare Impedit* 113, the learned author says "that *de jure communi*, all promotions are vacated by the taking of a bishopric, as such; and that, not only English promotions, by bishoprics in England; but likewise English promotions, by bishoprics in Ireland, & *vice versa*;" the consequence no doubt being understood to be, that the Crown would be entitled to present to *the [633 vacated benefices. So in Gibson's Codex, vol. 2, tit. xxxiii. cap. II., it is said: (b) "Upon promotion of any person to a bishopric in England or Ireland, the King hath right to present to such benefices or dig-

(a) Affirmed in Dom. Proc., Show. Ca. Par. 164, S. C. 1 Show. 413, 441, 493, 501; 1 Ld. Raym. 23.

(b) Page 763 (2d ed.).

nities, as the person was possessed of before such promotion." On the other hand, Lord Coke, 4 Inst. 356, 7, commenting upon the case in which the Bishop of Exeter was fined for his contempt in not admitting the King's presentee to an archdeaconry within his diocese which the archdeacon had vacated on being promoted to be Archbishop of Dublin, says: "that when the archdeacon was by the king preferred to a bishopric, he" (the king) "had the presentation to the archdeaconry in respect of the temporalities of the Bishop of Exeter patron of the archdeaconry, and not by any prerogative. And so it is, if an incumbent in Ireland be made a bishop in England." The temporalities of the see of Exeter had then been in the Crown, the see being vacant; and in this right alone had the Crown the power to present to the archdeaconry. But, if there had then been a Bishop of Exeter in whom the temporalities were vested, he and not the King would have been entitled to present to the archdeaconry on the archdeacon being promoted to be archbishop of Dublin. Lord Coke considers England and Ireland, with a view to the "cession" of ecclesiastical preferment on promotion to a bishopric, as different kingdoms with different churches, although under the same Crown. With reference to this, Lord Chief Baron Comyns, in his Digest, tit. *Esglise* (H. 6), after stating that, if an English archdeacon be created a bishop,^(a) the king shall present to the archdeaconry, *634] and *citing for this his authorities, adds, "Dub. 4 Inst. 356, 7." This doubt seems much strengthened by the Irish statute, 17 & 18 C. 2, c. 10, for preventing clergymen holding preferment in England from at the same time holding preferment in Ireland, and from the practice which seems to have followed thereon of clergymen holding preferment in England always resigning it before they are promoted to be bishops in Ireland.

But we do not think it necessary further to examine the authorities relating to this controverted question, or to give any opinion upon it; for, were the rule clear and undisputed, that, if the incumbent of a living in England is promoted to a bishopric in Ireland, the Crown shall present to the English living, we think the consequence would by no means follow that the Queen has a right to present to the church of Stratford Mortimer on the Reverend Henry John Chitty Harper being appointed and consecrated Bishop of Christchurch in the colony of New Zealand, although the same be "within and part of the dominions of our said Lady the Queen."

To establish this proposition, we may expect either some express authority or the explication of some principle which brings such a colonial bishopric into the category of English and Irish bishoprics for this purpose. Express authority there is none. The general dictum, that, if an incumbent is made a bishop the Crown shall present to his preferment thereby vacated, cannot be relied upon; for this evidently was meant to be understood of English preferment and an English bishopric: and the same writers who lay this down say that the rule does not extend to a titular bishop or a suffragan bishop under stat. 26 H. 8, c. 14. See Mullory, *Quare Impedit* 113; Com. Dig. tit. *Esglise* (N. 1.)

*635] *Nor has any principle been announced upon which the rule rests in respect of an English or Irish bishopric, and which would

(a) "In Ireland."

apply to this bishopric in New Zealand. The English and Irish bishops hold bishoprics founded and endowed by the Crown: they are prelates of a church which is the established church in England and in Ireland: they have by law well defined jurisdictions and important rights and privileges, both spiritual and secular. The Bishop of Christchurch in New Zealand has nothing in common with them, except that he is a Protestant Bishop, canonically consecrated, and holding the faith of the Anglican Church.

We do not question the power of the Queen to create a bishopric in any part of her dominions except where, as in Scotland, such an exercise of prerogative is forbidden. In a newly settled colony such an exercise of prerogative is lawful: but we must bear in mind that in such a colony there is no established church, and that the ministers of religion in communion with the church of England, with the church of Scotland, and with the church of Rome, in the absence of any imperial or colonial legislation on the subject, are all upon an equal footing. If, by legislative enactment, there were a fund created for the support of "the Protestant clergy in New Zealand," according to the opinion given by the Judges in the House of Lords upon the Canada Reserves,^(a) the Episcopalian and Presbyterian clergy in the colony would be entitled to share it in equal proportions. It has likewise been held that the Crown may create an Ecclesiastical Roman Catholic corporation in an English colony, as well as a Protestant bishopric.

The bishopric of Christchurch in New Zealand has *been created purely by the prerogative of the Crown, without any such statute as 53 G. 3, c. 155,^(b) or 3 & 4 W. 4, c. 85,^(c) which authorized the Crown to grant jurisdiction to bishops to be created in India, and to establish a hierarchy in that country, as had been before done in Jamaica and other parts of the dominions of the Crown in the West Indies. We by no means say that the promotion of an English incumbent to be a bishop in the East or West Indies would give the Crown a right to present to his English preferment: but there is great difficulty in seeing that the Bishop of Christchurch in New Zealand has any jurisdiction except over those who voluntarily submit to his jurisdiction: and he really seems in this respect to be in the situation of the "titular Bishop," whose promotion to be a bishop, all the authorities agree, gives the Crown no right to present to his preferment.

Had the declaration been sufficient in showing a *prima facie* right in the Crown to present to this living on the promotion of the incumbent to a bishopric, we should have had no difficulty in deciding that the plea is bad: for although the advowson was granted by the Crown to Eton College, and this grant was confirmed by Parliament, the claim to present on such a vacancy would be an incident of the right granted, and not in derogation of the grant.

But, being of opinion that the declaration shows no title in the Crown, and that the right to present to the living was the same as if the vacancy had arisen upon the death of the incumbent, it is our duty to give judgment for the defendants. Judgment for defendants.

(a) Journals H. Lords, 4 May, 1840, p. 254.

(b) Sect. 51. &c.

(c) Sect. 92, &c.

***637] The QUEEN v. The Recorder of CAMBRIDGE. Nov. 9.**

On appeal, against a valuation of rateable property under a local Act (19 & 20 Vict. c. xviii.), to the Sessions for the borough of C., the recorder, who tried the appeal, reduced the rate, and ordered that the costs should be paid by the respondents. The amount of costs not being then ascertained, he adjourned the case to the next Sessions. At these a deputy recorder (appointed under stat. 6 & 7 Vict. c. 89, s. 8), presided. The costs were in fact taxed by the recorder, who reduced them: but the order for costs was drawn up at the Sessions at which the deputy recorder presided, and formally entered as of such Sessions, the deputy recorder, however, not otherwise taking any part in the matter.

The respondents were the parish officers of a parish comprised in an union which comprehended several other parishes; and the deputy recorder was a rated inhabitant in one of such other parishes. All the parishes contributed to a common fund for the relief of the poor.

Held that the order for costs must be considered as the order of the deputy recorder, and was voidable on account of his interest. And that stat. 16 G. 2, c. 18, s. 1, was inapplicable, as applying only to cases where justices act as such, in the making of orders out of Court, and not to the exercise of appellate jurisdiction.

TOZER, in this Term, on behalf of The Guardians of the Poor of the Cambridge Union, obtained a rule calling on Henry Storks, Esquire, Recorder, and George Leapingwell, Esquire, Deputy Recorder, of the borough of Cambridge, to show cause why a certiorari should not issue, to remove into this Court an order made by them, or one of them, at the General Quarter Sessions of the peace for the said borough, on 29th June last, or, at a supposed adjournment thereof, on 30th June, or, at a supposed or further adjournment thereof, on 19th October last, upon an appeal between The Cambridge University and Town Waterworks Company, appellants, and The Guardians of the Poor of the Cambridge Union, respondents, against a certain valuation of the rateable property in the parish of Saint Andrew the Less, in the said borough, made under the provisions of The Cambridge Award Act, 1856, at the instance of the said guardians.

From the affidavits it appeared that the Cambridge Union comprehended fourteen parishes, of which St. Andrew the Less was one.
***638]** After the coming into effect of The Cambridge Award Act, 1856, (a) the guardians caused a valuation of the rateable property in the Union to be made, pursuant to the provisions of the Act: (b) and that in this property was included the rateable property of the Company throughout the fourteen parishes. The Company commenced fourteen appeals (c) against the several valuations in each parish. At the Quarter Sessions for the borough of Cambridge on last 5th January the appeals came on for trial, and were heard before Doctor George Leapingwell, the Deputy Recorder, the Recorder being Henry Storks, Esquire, Serjeant at Law. Dr. Leapingwell, in the case of each parish, reduced the gross estimated rental and the rateable value. After this, it was for the first time discovered that Dr. Leapingwell was a shareholder in the Company. He had, in fact, sold his shares, but had not completed the transfer. The Guardians afterwards made absolute a rule for removing the orders into this Court; and the same were, in last June, quashed; and it was ordered that continuances should be entered, and the appeals be reheard. At the borough Quarter Sessions held on 29th June the Recorder heard

(a) 19 & 20 Vict. c. xviii. (local): "To confirm an award for the settlement of matters in difference between the University and Borough of Cambridge, and for other purposes connected therewith." Printed in the Statutes at Large.

(b) Sect. 37.

(c) Sect. 38.

the appeals. It was agreed that there should be a trial in one case only, that of St. Andrew the Less, as if all the property were situate in that parish; and that the Recorder should, if necessary, apportion the assessment among the fourteen parishes. He, in the case of St. Andrew the Less, reduced both the gross estimated rental and *the rateable value, and ordered that the Guardians should pay to the Company the costs. The sessions were formally adjourned to the next General Quarter Sessions for the borough; and the appeals were also respite to those Sessions. The next Sessions were held on 19th October, before Dr. Leapingwell, the Deputy Recorder. At these Sessions the Company applied for their costs. The clerk of the peace was himself a guardian; and therefore the Recorder, Mr. Serjeant Storks, himself taxed the costs, reducing them in amount; and a formal order was made for the amount so reduced. The other thirteen appeals were withdrawn. At this time the Deputy Recorder had ceased to be a shareholder in the Company, having transferred his shares since the preceding Sessions: but he occupied rateable property in one of the thirteen parishes which, together with St. Andrew the Less, made up the Union. The Guardians, previously to his making such formal order, protested against the jurisdiction. He stated that it must be distinctly understood that he made no order himself. The order for payment of costs set forth the order of the June Sessions, as held before the Recorder, including the reduction of the rate, the general order for costs, and the adjournment of the Sessions (not of the case); and then the order made at the October Sessions, as held before Dr. Leapingwell, the Deputy Recorder, as follows: "This Court doth this day fix and allow the costs of the appellants in and about the said appeal at the sum of 250*l.*, which to the Court doth seem reasonable and just. And this Court doth order that the said Guardians," &c., "do forthwith, upon service of this order, pay unto the said" Company "the said sum of 250*l.* as and for such costs as aforesaid. By the Court." By sect. 36 of The Cambridge Award *Act, 1856, "all the costs and charges for the relief of the poor in the several parishes in the said Union shall be borne by one common fund, to which such parishes shall contribute in proportion to the annual rateable value of the lands, tenements, and hereditaments therein assessable by law to the relief of the poor."

Byles, Serjt., *O'Malley*, *Hugh Hill*, and *Couch* now showed cause.—It is understood that two objections are made to the order for costs: first, that the adjournment was improper; secondly, that the Deputy Recorder was interested. As to the first, it appears that both the case and the Sessions were adjourned: the respite was at any rate legitimate as to the case, and probably, if that were important, as to the Sessions. As to the second ground, the taxation by the Recorder was clearly unobjectionable; and the only question is whether the order is made bad by its having been made at a Sessions at which the Deputy Recorder, who was to a certain extent interested in the result, presided, but practically took no part in producing it. It is not the less the taxation of the Recorder because not made when he sat in Court: *Regina v. The Justices of Westmoreland*, 1 D. & L. 178, 188. In *Dimes v. Proprietors of the Grand Junction Canal*, 3 H. L. Ca. 759, it was held that the decree of the Lord Chancellor, who was a shareholder in the Company

of the defendants, was voidable. But a decision, in such a case, cannot be voidable at the instance of the party in favour of whom the judge is interested, as is the case with the present order. Besides, by stat. 16 G. 2, c. 18, s. 1, it is enacted: "That it shall and may be lawful to and *641] riding, city, liberty, franchise, borough, or town corporate within their respective jurisdictions, to make, do, and execute all and every act or acts, matter or matters, thing or things appertaining to their office as justice or justices of the peace, so far as the same relates to the laws for the relief, maintenance, and settlement of poor persons; for passing and punishing vagrants; for repair of the highways; or to any other laws concerning parochial taxes, levies, or rates; notwithstanding any such justice or justices of the peace is or are rated to or chargeable with the taxes, levies, or rates within any such parish, township, or place affected by any such act or acts of such justice or justices as aforesaid." [Lord CAMPBELL, C. J.—You have to get rid of the proviso in sect. 3: "That this Act, or anything therein contained, shall not authorize or empower any justice or justices of the peace for any county or riding at large, to act in the determination of any appeal to the Quarter Sessions for any such county or riding, from any order, matter, or thing relating to any such parish, township, or place, where such justice or justices of the peace is or are so charged, taxed, or chargeable as aforesaid; anything herein contained to the contrary in any wise notwithstanding."] That disqualifying proviso applies only to justices of counties and ridings: the qualifying enactment in sect. 1 is general. And there seems good reason for this, since in boroughs it might be difficult to find justices not interested, a difficulty not likely to occur in counties. Sect. 2 also relates to all justices. Further, it may be questioned whether the township in which Dr. Leapingwell resides is contributory to these costs: they are not literally within the words "costs and charges for *642] the *relief of the poor," in sect. 36 of The Cambridge Award Act, 1856.

Bovill (with whom were *Tozer* and *W. J. Metcalfe*), contra.—First, the case might be adjourned, but not the Sessions. If the adjournment made the October Sessions one with the June Sessions, then Dr. Leapingwell becomes a party to the proceeding in June, at which time he had not completed the transfer of his shares. If they are different Sessions, the costs have been taxed after the end of the Sessions at which they were ordered. (The Court pronounced no judgment on this point: *Lingfield v. Battle*, 2 Salk. 605, and *Regina v. Long*, 1 Q. B. 740 (E. C. L. R. vol. 41), were referred to.) Then, secondly, treating this as an order by Dr. Leapingwell, the objection as to his interest is not cured by stat. 16 G. 2, c. 18. He was not acting as a justice of the peace, but as a Deputy Recorder, appointed for the particular Sessions, under stat. 6 & 7 Vict. c. 89, s. 8. He may do all that the Recorder, as such, could do: but he is not (as the Recorder is, under stat. 5 & 6 W. 4, c. 76, s. 103) ex officio a justice of the peace. It is understood that Dr. Leapingwell is in fact a justice of the peace of the borough; but he did not act in that character at the Sessions. He takes no oath and makes no declaration (as the Recorder does, under stat. 5 & 6 W. 4, c. 76, s. 104). Now it is only to the acts of justices, as such, that stat. 16 G. 2, c. 18, s. 1, applies: that enactment has nothing to do with the appel-

late jurisdiction of justices in Quarter Sessions. (He was then stopped by the Court.)

Lord CAMPBELL, C. J.—I am of opinion that in this case the certiorari must go: and I am very sorry that *I am obliged to come to that opinion, and that this sort of civil war is going on amongst [*643 parties who ought to unite in taking advantage of the immense benefit conferred upon them by the award of our brother Patteson.(a) But it seems to me that Dr. Leapingwell, though in fact he could not in the most remote degree be influenced in making this order, still had an interest which vitiates any award of costs he could make. If, indeed, the case were within stat. 16 G. 2, c. 18, the objection would be met. But that statute removes the objection only as to justices: the Deputy Recorder was not here acting as a justice of the borough. He was a special functionary. The object of the enacting clause of the statute clearly was to give powers to make original orders out of Court, not any appellate jurisdiction.

(COLERIDGE, J., was absent.)

WIGHTMAN, J.—It is clear beyond doubt that this order for costs is the order of Dr. Leapingwell, and his judicial act; and that he has a personal interest in the result, because the costs will be levied out of the common fund to which the parish where he is an occupier will contribute. Stat. 16 G. 2, c. 18, s. 1, relates only to cases where the justice is acting in the exercise of his general powers as a magistrate: here Dr. Leapingwell was acting as Deputy Recorder, not as justice; and the case is not within the meaning of the enactment.

ERLE, J.—I am of the same opinion; and I have nothing to add.

Rule absolute.

(a) See Preamble to stat. 19 & 20 Vict. c. xvii.

*Ex Parte CHAMBERLAINE. Nov. 25. [*644

No appeal lies against a refusal by justices to grant a billiard license under stat. 8 & 9 Vict. c. 109, s. 10.

COLLIER moved for a mandamus commanding the Justices of Devonshire, at the Quarter Sessions for the county, to hear an appeal against a refusal by the justices of the borough of Plymouth to grant a license to keep a billiard-table, under stat. 8 & 9 Vict. c. 109, s. 10. The Court of Quarter Sessions had refused to entertain the appeal, on the ground that they had no jurisdiction.

Collier, in support of his motion.—It is true that no appeal is given by stat. 8 & 9 Vict. c. 109, except against convictions (sect. 20). But the question is whether there is not an appeal under stat. 9 G. 4, c. 61, s. 27. Under that section, the refusal to grant a license is an act done in or concerning the execution of the statute; and a party may appeal from the act of a justice of a town to the county quarter sessions. It is true that the language is literally applicable only to "any person who shall think himself aggrieved by any act of any justice done in or concerning the execution of this Act," that is, of stat. 9 G. 4, c. 61. But it seems reasonable to construe the two Acts together: the recognisances

and other incidents of an appeal are analogous in the two cases: and the policy of the Legislature in respect to public-houses can hardly have been different from that in respect of billiard-tables: and indeed sect. 10 *645] of stat. 8 & 9 Vict. *c. 109, makes the licenses grantable at the same meetings, and requires similar notices. It may therefore be said that the billiard licenses granted under stat. 8 & 9 Vict. c. 109, are in effect granted under an extension of stat. 9 G. 4, c. 61.

Lord CAMPBELL, C. J.—No appeal can be made except under express enactment: and there is none such in either of the statutes in the case of billiard licenses.

(COLERIDGE, J., was absent.)

WIGHTMAN, J., concurred.

ERLE, J.—The Legislature perhaps intended that the refusal to grant a billiard license should be without appeal. Rule refused.

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*REGULÆ GENERALES.

Nov. 25. The following General Rules were read in Court this day.

General Rules. Michaelmas Term, 1857.

1st. It is ordered that in cases of appeal to a superior Court under the provisions of the statute 20 & 21 Vict. c. 43, the 15th and 16th practice rules of Hilary Term, 1853,(a) so far as the same are applicable, shall be observed.

2d. And, in cases when the appeal is to be heard before a Judge at Chambers, the appellant shall obtain an appointment for such hearing, and shall forthwith give notice thereof to the respondent, and shall, four clear days before the day appointed for the hearing, deliver at the Judge's Chambers a copy of the appeal.

CAMPBELL.

A. E. COCKBURN.

FRED. POLLOCK.

WM. WIGHTMAN.

W. ERLE.

E. V. WILLIAMS.

SAMUEL MARTIN.

R. B. CROWDER.

J. WILLES.

G. BRAMWELL.

W. F. CHANNELL.

(a) Reg. Gen. H. 1857, L. 15, 16. See 1 E. & B. iv. (E. C. L. R. vol. 72).

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

—

Michaelmas Vacation,

XXI. VICTORIA. 1857.

The Court of Queen's Bench did not sit in Banc in this Vacation.

IN THE EXCHEQUER CHAMBER.

JOHN COLLEN *v.* MARY WRIGHT, ROBERT JOHN WRIGHT,
and ADAM TAYLOR the Younger, Executrix and Executors of
ROBERT WRIGHT.

Defendant's testator, W., professing to act as agent for G., made an agreement with the plaintiff for the lease of a farm belonging to G., and signed it "W., agent to G., lessor." He had not, in fact, authority from G.

Held on appeal, in affirmance of the judgment of the Queen's Bench, by the Court of Exchequer Chamber (Cockburn, C. J., dissentiente), that there was a contract on the part of W. that he had authority, on which his representatives were liable.

Mainiff instituted a suit for specific performance against G. Plaintiff gave notice, on hearing that G. denied the authority of W., to W. that plaintiff would proceed with the suit at W.'s risk, unless W. gave him notice not to proceed; and, in the event of his bill being dismissed on account of absence of authority, would hold W. liable. W. answered by denying all liability, but without retracting his assertion that he had authority. The bill was dismissed on the ground of W.'s want of authority.

Held by the Exchequer Chamber (in affirmance of the decision of the Queen's Bench), that the testator was liable for the costs of the suit, they being, under the circumstances, a natural and direct consequence of the contract that there was authority

APPEAL from the decision of the Court of Queen's Bench on a case stated without pleadings. The *case will be found stated in full in the report below: Collen *v.* Wright, 7 E. & B. 301.(a) In sub-stance, it stated that the testator Wright was land agent for a gentleman named Gardner, and, as such, made an agreement with the plaintiff for the lease to him for 12½ years of a farm of Gardner's. A formal agreement between landlord and lessee was drawn up and signed by the testator in the following form: "Robert Wright, agent to William Dunn Gardner, Esquire, lessor." It was also signed by plaintiff. The plaintiff

(a) See *Simons v. Patchett*, 7 E. & B. 568 (E. C. L. R. vol. 20).

entered on the farm on the strength of this agreement. Mr. Gardner refused to execute any such lease, alleging, accurately as it proved, that he had conferred on the testator no authority to agree for a lease for so long a term. The plaintiff had commenced a suit in Chancery against Gardner for a specific performance. On discovering the ground of defence, his solicitors sent to Wright a formal notice that, unless they received from Wright notice to the contrary, the plaintiff would proceed with the suit at Wright's expense; and, in the event of his bill being dismissed on the ground of the absence of authority, would commence an action to recover the costs and other damages by reason of Wright's want of authority. Wright's solicitor sent an answer, dated 11th April, 1855, denying Wright's liability to any action, but not containing any admission that Wright had not had full authority. The suit was proceeded with, and the bill dismissed with costs, on the ground that Wright had no authority from Gardner to sign the agreement. The case in the Queen's Bench was stated after Wright's death, and submitted two questions to the Court: 1. Whether the plaintiff is entitled to maintain *649] an action against the defendants, as executrix and executors of the said Robert Wright, to recover damages; 2. Whether, if so, the whole of the damages sustained by the plaintiff, including his costs of the said suit in Chancery, can be recovered; or, if some of such damages and costs only can be recovered, which of them, and to what extent, without regard, however, to the exact amount. The case contained provisions for a judgment, subject to an arbitration to ascertain the amount of damages according to the principles laid down by the Court. The Court of Queen's Bench ordered that judgment should be "entered for the plaintiff for such amount of damages as shall include money laid out and costs of Chancery suit." The defendants appealed.

Phipson, in Trinity Term, 1857, (a) argued for the appellants, defendants below.—The case is stated without pleadings; but, the action being against personal representatives, the plaintiffs cannot succeed on any ground except on that of a contract by the testator. If there had been any deceitful representation by Wright, that would have given ground for an action in tort against him whilst he lived; but against the representatives the only question is whether there was a contract. The appellants contend that there is no contract, and that, in the absence of fraud or deceit, no action would have lain against the testator himself. In *Evans v. Collins*, 5 Q. B. 804 (E. C. L. R. vol. 48), the declaration stated that the plaintiffs were the sheriff of Middlesex, and defendants had delivered to plaintiffs a ca. sa., sued out by defendants as solicitors, against J. Wright, and plaintiffs also held in custody another person of *650] the same name under another ca. sa.; and that *plaintiffs were about to discharge the last-mentioned J. W. when defendants "falsely represented and declared to plaintiffs, so being such sheriff, that the last-mentioned J. W., so then being in the lawful custody of plaintiffs as such sheriff, and whom the plaintiffs were then about to discharge from their said custody, was the same person as the other J. W." against whom the said writ had been issued by defendants as attorneys, and thereby induced plaintiffs to detain the J. W. who was not the person against whom defendants had sued out the ca. sa.;

(a) Saturday, June 13th. Before Cockburn, C. J., Williams and Willes, J., Pollock, C. B., Watson and Channell, Bs.

whereby plaintiffs became liable to damages. Amongst other pleas was one that the defendants, at the time they made the representation, had good reason to believe, and bonâ fide did believe, that the person in custody was the same person as the other J. W. against whom the writ was issued by defendants. On this plea an issue was joined, which was found for the defendants. The Court of Queen's Bench thought the plea bad, and gave judgment for the plaintiffs non obstante veredicto. Their reasons are very similar to those urged in support of the judgment below in this case. They say: "One of two persons has suffered by the conduct of the other. The sufferer is wholly free from blame; but the party who caused his loss, though charged neither with fraud nor with negligence, must have been guilty of some fault when he made a false representation. He was not bound to make any statement, nor justified in making any which he did not know to be true: and it is just that he, not the party whom he has misled, should abide the consequence of his misconduct. The allegation that the defendant knew his representation to be false is therefore immaterial: without it, the declaration discloses enough to maintain the action; and nothing that goes beyond *that necessity need be proved." But the Court of Exchequer Chamber, in *Collins v. Evans*, 5 Q. B. 820 (E. C. L. R. vol. 48), [*651 reversed this judgment. In delivering judgment, Tindal, C. J., says: "The question, therefore, before us is, whether the defendants, having reason to believe, and actually believing, a fact to be true, and representing it as such to the plaintiffs, are liable to an action if it turns out in the event that they were mistaken, that is, whether falsehood in a statement, without fraud, is actionable. It is unnecessary to determine (upon which, however, a question has been made) whether the declaration contains an allegation sufficiently distinct and precise that the defendants did know the statement to be false; for, even if there is such allegation, the finding of the jury on the third plea negatives it; and the question is brought round again precisely to the same point, viz. whether a statement or representation, which is false in fact, but not known to be so by the party making it, but on the contrary made honestly and in full belief that it is true, affords a ground of action." After referring to the authorities he proceeds: "And we think the circumstances, that the defendants had better means of knowledge than the plaintiffs of the truth of the statement made, which was one ground of distinction relied upon in argument, is not a sound reason for holding the present defendants liable; for such was a fact common to all the cases of actions for false representations. The plaintiff, in all those cases, being ignorant of the state of his debtor's solvency, makes inquiry of those who have better means of knowledge than himself; and yet, in all those cases, if the answer given is honest, though untrue in point of fact, the action has been held not to be sustainable." *And [*652 *Ormrod v. Huth*, 14 M. & W. 651,† is an authority to the same effect. [POLLOCK, C. B.—It will probably not be disputed that a representation is not actionable unless dishonestly made, or unless it be a warranty. But, in deciding whether there is a warranty or not, you must not reject the position of the parties and the nature of the representation. Thus, in *Morley v. Attenborough*, 3 Exch. 500,† the Court of Exchequer, whilst deciding that the sale of a chattel does not in itself imply a warranty of title, threw out that it might be implied from the

nature of the trade in which the goods were sold. And, though there is no implied warranty of the condition of victuals sold by an ordinary person, there may be one where the sale is by a victualler: *Burnby v. Bollett*, 16 M. & W. 644.†] There seems to be nothing in the present case to afford a stronger inference of an implied promise than in *Collins v. Evans*, 5 Q. B. 820 (E. C. L. R. vol. 48), and *Ormrod v. Huth*, 14 M. & W. 651;† and, if there is such an implied warranty in such cases, it is remarkable that this should be the first case in which it has been acted upon. [COCKBURN, C. J.—Is it not assumed throughout the judgment in *Smout v. Ilbery*, 10 M. & W. 1,† that in such a case the supposed agent is liable?] It is; but upon the ground that there is a wrong. That case was antecedent in date to *Collins v. Evans*, 5 Q. B. 820 (E. C. L. R. vol. 48): in *Smout v. Ilbery*, 10 M. & W. 1,† it was supposed that an action would lie for such a representation as the Court of Exchequer Chamber in *Collins v. Evans*, 5 Q. B. 820 (E. C. L. R. vol. 48), decided not to be actionable. Here the intention of both the plaintiff and the testator was to make a contract between the lessor and the lessee. If the testator had been asked if he would warrant that he *653] had *authority, he might have answered that he believed he had, but that he would warrant nothing. All suggestions of laches and superior means of knowledge, which would be relevant enough if a right of action for a wrong would support the judgment, are excluded by the fact of the defendants being executors, who are not liable for wrongs, only for contracts. If there was a warranty, they would have been equally liable, although the facts had been that their testator was, without any negligence, deceived by a forged power of attorney, or even if he had had full authority, which had, without his knowledge, been revoked by the death of his principal abroad before the agreement was made. It cannot be supposed that a warranty to this extent could be intended: and, though implied contracts are sometimes spoken of as if they were independent of the intention of the parties, “the only difference between an express and an implied contract, is in the mode of substantiating it. An express contract is proved by an actual agreement; an implied contract by circumstances, and the general course of dealing between the parties:” by Lord Tenterden, C., in *Marzetti v. Williams*, 1 B. & Ad. 415, 423 (E. C. L. R. vol. 20). And Erle, J., in *Lewis v. Nicholson*, 18 Q. B. 503 (E. C. L. R. vol. 88), expresses a similar opinion. [WATSON, B.—In the argument in *Jenkins v. Hutchinson*, 13 Q. B. 744 (E. C. L. R. vol. 66), you will find a great mass of authority to show that, in such a case as this, the person professing to be an agent is liable personally on the contract. Till that case it was generally supposed that the manner in which he might be made liable was by treating him *654] as principal in the contract he professed to make.] The *cases are all collected in the notes in *Smith’s Leading Cases*, (2 *Smith’s L. Ca.* (4th ed.) 297,) to *Thomson v. Davenport*, 9 B. & C. 78) E. C. L. R. vol. 17). In *Polhill v. Walter*, 3 B. & Ad. 114 (E. C. L. R. vol. 23), Lord Tenterden intimates that, had the defendant been perfectly honest in his affirmation of authority, he would not have been answerable in any way. In a note to *Story on Agency*, sect. 264, an opinion is thrown out that in such a case there is an undertaking for the truth of the representation. That is the first place in which the position is advanced. In *Lewis v. Nicholson*, there is a dictum approving of this idea. In *Randell*

v. Trimen, 18 Com. B. 786 (E. C. L. R. vol. 86), no point of this sort could arise: the verdict was for the plaintiff on the allegation of falsehood and fraud, and the question before the Court was whether the verdict was against the weight of evidence. So that the present is the first case in which the notion that there is an implied warranty has been acted upon. [WILLES, J.—In the Code Civil, (a) it is provided that, if the mandate is submitted to the inspection of the other side, there shall be no warranty implied; an exception which seems to recognise the general doctrine. As that code is founded on the old French law, and ultimately on the Digest, it is probable that the doctrine is more ancient than you suppose.] The warranty, if there were one, would render the agent liable in a case where the authority was revoked by the death of the principal abroad, as in *Smout v. Ilbery*, 10 M. & W. 1.† * [POLLOCK, C. B.—It may be doubted if in *Smout v. Ilbery* there was any representation of agency on the part of the wife at all. The husband seems, before going abroad, to have himself ordered the plaintiff to supply his family. But there is an implied exception of the duration of life in many contracts; as, for instance, of service. It may be that there is a contract of warranty, but that it is subject to such an exception. When the case arises I will give an opinion on that; at present it is enough to say that it is not the case before us.] The true rule of law, it is submitted, is that laid down in the notes in *Smith's Leading Cases* (b) to *Chandelor v. Lopus*, Cro. Jac. 4; that the representations are only warranties if so intended. [*655]

Then, assuming that there is a cause of action, the costs of the Chancery suit cannot be recovered. They were not a necessary consequence of the want of authority: *Walker v. Hatton*, 10 M. & W. 249;† *Penley v. Watts*, 7 M. & W. 601.† The test is said to be whether a reasonable and prudent man would have adopted this course: *Tindall v. Bell*, 11 M. & W. 228.† Here the plaintiff was informed that there was no authority; and he persisted in proceeding as if there was. That was unreasonable, unless he did so at his own peril. [COCKBURN, C. J.—He was informed by Gardner that there was no authority. If he had been so told by the testator I should have felt your remark to be very forcible: but, as a reasonable man, he might well proceed in the suit when, having informed the testator of his intention, he received an answer not admitting that there was no *authority.] The damage is not the natural and contemplated consequence of the contract: *Hadley v. Baxendale*, 9 Exch. 341.† [WILLIAMS, J.—It seems to me that, if there was a promise that the landlord contracted to grant the lease, the parties must have contemplated that the lessee would take steps against the landlord to enforce that contract.] [*656]

O'Malley, for the respondent (plaintiff below), was desired by the Court to confine his argument to the first point.—It always was considered that he who entered into a contract professedly as agent, but not really having authority, was liable. It used to be supposed that he was liable directly as himself principal on the contract which he professed to make, and, so long as this was supposed to be the law, it is natural that

(a) Code Civil (liv. 3, tit. xiii., cap. 2), art. 1997. "Le mandataire qui a donné à la partie avec laquelle il contracte en cette qualité, une suffisante connoissance de ses pouvoirs, n'est tenu d'aucune garantie pour ce qui a été fait au-delà, s'il ne s'y est personnellement soumis."

(b) 1 *Smith's L. Ca.* (4th ed.), 141.

actions on a warranty should not have been common. In *Jenkins v. Hutchinson*, 13 Q. B. 744 (E. C. L. R. vol. 66), it was decided that it was contrary to principle to make the agent contract as principal when both parties intended the contrary; but there was no decision in that case that there was not the same remedy in substance. The authorities have all been already cited. In *Ormrod v. Huth*, 14 M. & W. 651,† and *Smout v. Ilbery*, 10 M. & W. 1,† the facts were as much within the knowledge of the one party as the other; the merchant who sold the bale of cotton in Liverpool was as ignorant as the purchaser of the way in which it had been packed abroad: the wife had no better means of knowing whether the husband was or was not alive than the butcher. But here the extent of the testator's authority was peculiarly within his knowledge; and his assertion to the plaintiff, as a basis on which the *657] plaintiff was to contract, that he was agent *for the lessor, was an express contract, not merely an implied one.

Phipson was heard in reply.

Cur. adv. vult.

In this vacation (November 30), there being a difference of opinion on the Bench, separate judgments were delivered.

WILLES, J., delivered the following judgment, in which POLLOCK, C. B., WILLIAMS, J., and BRAMWELL, WATSON, and CHANNELL, Bs., concurred.

It appears to me that the judgment of the Court of Queen's Bench ought in all respects to be affirmed. I am of opinion that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. This is not the case of a bare misstatement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the *658] faith of the professed agent being *duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise. Indeed the contract would be binding upon the person dealing with the professed agent if the alleged principal were to ratify the act of the latter. This was, in effect, the view taken by the Court of Queen's Bench, and to which I adhere. With respect to the amount of damages, I retain the opinion thrown out in the course of the argument, that all the expenses sought to be recovered were occasioned by the assertion of authority made at the time of the contract being continued and persisted in by the defendant's testator and bonâ fide acted upon by the plaintiff. That assertion was never withdrawn, not even in the letter of 11th April, 1855, in answer to the plaintiff's notice to the defendant's testator, long after the proceedings in Chancery had commenced and whilst they were in

full progress. I am therefore of opinion that the judgment of the Queen's Bench was right, and that it ought to be affirmed.

COCKBURN, C. J.—I regret most unfeignedly to find myself differing in this case from so many of my learned brothers, for whose opinions I entertain the profoundest respect and deference, and in whose views I should have every disposition to acquiesce, if, after considering the subject with the most anxious desire to concur with them, I could persuade myself that in giving judgment for the plaintiff we were not going beyond what the law warrants. The proposition we are called upon to affirm is, that by the law of England a party making a contract as agent in the name of a principal impliedly contracts with the other contracting party that he has authority *from the alleged principal to make the contract, and that, if it turns out that he has not this authority, he is liable in an action on such implied contract. It appears to me that there is not sufficient authority to warrant this position, and that, even assuming for the purpose of the argument that such a rule might be desirable, in establishing it we shall be creating a new law instead of expounding that which already exists. I believe I am fully justified in saying that this doctrine is altogether a novel one. I have looked carefully into the various treatises and text books on the law of contracts; and, so far as I have been able to discover, although the doctrine of implied contracts has been fully discussed, and the instances of implied contracts as existing in the law of this country carefully enumerated, no mention is to be found of the implied contract contended for in this case. Nor is any trace of such an action to be found, so far as I am aware, in the printed books of precedents on the forms of actions and of pleading. And, what is still more remarkable, in the learned and elaborate works which treat of the law relating to agency, and in which the liabilities of agents, or persons professing to act as such towards third parties, are fully considered, not even a hint is to be found of any implied contract on the part of the agent as to the existence of the authority on which he professes to act. In Professor Story's work on Agency,^(a) while it is laid down as clear that a person contracting as agent without authority will be liable to the party with whom the contract is made, yet, when the mode in which that liability is to be enforced is considered, the alternative is put between a special action on the case on *the one hand, and an action on the contract against the professed agent as principal on the other; but it does not appear to have occurred to that very learned and scientific jurist that, either by the law of England or that of America, an action could be maintained on an implied contract as to the existence of authority. In like manner, in the note^(b) to the case of *Thompson v. Davenport*, 9 B. & C. 78 (E. C. L. R. vol. 17), where the principles as to liability as collected from the cases on agency are laid down, it is asserted that if a man state himself to be an agent, but have really no principal, he is, in law, himself the principal; but it is not suggested that he is liable *ex contractu* in any other form than as principal on the original contract. Nor is this silence to be wondered at; for, on looking to the reported decisions of our own and of the American

(a) *Story's Commentaries On the Law of Agency*, ch. x., sect. 264, and note 3 there.

(b) 2 *Smith's L. Ca.* 297 (4th ed.).

Courts, it will be found that at the time these learned authors wrote no such doctrine had ever been broached, but the remedy against a party contracting on behalf of another without authority was assumed to be either by an action on the case for the false representation, or by an action against him as principal on the original contract. The doctrine that a person professing to act as agent without sufficient authority might be made responsible as principal was only subverted at a comparatively recent period. In Paley's work *On the Law of Principal and Agent*, chap. 6, sect. 1, p. 386 (3d ed.), it is laid down, and supported by authorities, that a party contracting as agent is responsible as principal, where there is no responsible principal to resort to, or where he exceeds his authority so that the principal is not bound. Story we have seen holds the like language. In the case of *Jones v. Downman*, 4 Q. B. 235 (E. C. L. R. vol. 45), *661] "which was an action *ex contractu*, the doctrine of Story,^(a) that, "wherever a party undertakes to do any act, as the agent of another, if he does not possess any authority from the principal, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal," was adopted by the Court of Queen's Bench, as "supported by numerous authorities," and "founded on plain justice." And the defendant, who was there sued as principal, was held to be liable on the contract. It is true that that case was afterwards reversed on error in the Court of Exchequer Chamber,^(b) but solely on the ground that the absence of authority was not shown; and the Court, in other respects, appears to have recognised the propriety of the decision of the Court of Queen's Bench. And in a note to the case of *Thomas v. Hewes*, 2 C. & M. 519, 530, n.,† the same law is stated to have been laid down on different occasions by the late Mr. Baron Bayley, and by Lord Wensleydale when a Baron of the Exchequer; and the case of *Smout v. Ilbery*, 10 M. & W. 1,† where an action was brought against a married woman for goods purchased by her on her husband's account after her authority to pledge his credit had been terminated by his death, of which fact she had been ignorant, though the Court held that the action could not be maintained under the circumstances, it was never doubted that the action was rightly brought in contract. The case of *Polhill v. Walter*, 3 B. & Ad. 114 (E. C. L. R. vol. 23), in which it was held that a person accepting a bill drawn upon another in the name of the drawee without authority could not be sued upon the bill as acceptor, *662] seems *first to have given rise to a contrary impression, although that case turned mainly on the peculiar character of a bill of exchange as incapable of being accepted by any one but the drawee except for honour of the latter. But the more recent case of *Jenkins v. Hutchinson*, 13 Q. B. 744 (E. C. L. R. vol. 66), laid down the position broadly that an action *ex contractu* could not be maintained against the professed agent as principal: and the same doctrine was fully confirmed and acted upon in the succeeding case of *Lewis v. Nicholson*, 18 Q. B. 503 (E. C. L. R. vol. 83). In the meantime, the liability of a professed agent for the unwarranted assertion of authority in an action on the

(a) Sect. 264.

(b) *Downman v. Williams*, 7 Q. B. 103 (E. C. L. R. vol. 53).

case underwent further consideration; and the doctrine of some writers, that any misrepresentation whereby another was induced to do, or omit to do, an act from which injury resulted, would render the party making it liable, underwent material modification, the modern decisions having established that such misrepresentation will not afford a ground of action where made in good faith and without knowledge that it was untrue. The effect of these doctrines being to leave a person who made a contract with another as agent without a remedy where the professed agent had acted under a mistaken impression as to his authority, it occurred to the Judges of the Court of Queen's Bench who decided, in the case of *Lewis v. Nicholson*, that an action would not lie against the agent as principal, to suggest that, possibly, the agent might, under such circumstances, be held liable on an implied contract that he had authority to contract in the name of the principal. And the opinion thus incidentally thrown out in that case has been acted upon in this. It was of course impossible, so long as the doctrine prevailed that the professed agent could be sued as principal, that he could be held to be liable on this implied contract. It would have been obviously [*663 inconsistent to say that upon one and the same contract a man could at the same time be liable upon an express and also upon an implied promise. To my mind it by no means follows that, because that which was believed to be the remedy in law turns out upon further consideration not to be so, we are therefore justified in resorting to the fiction of an implied contract hitherto unknown to our law. To me it seems a very strong argument against the existence of any such implied contract that, frequently as the question of the absence or excess of authority in supposed agents has been before our Courts, and much as the question of the liabilities of agents has been discussed, no trace of this doctrine is to be found in our law books until within the last few years. I do not think we are justified in introducing such a remedy by the mere fiat of a judicial decree. I do not stop to discuss the expediency or policy of the proposed rule. Otherwise I think it might be shown that there are two sides even to this part of the case. I doubt whether there is any sufficient ground why erroneous representation, in the absence of falsehood or fraud, should create a greater responsibility in the case of a contract than in the case of any other transaction, especially as the other contracting party might always protect himself by insisting on communicating with the alleged principal, or by requiring a warranty of authority from the agent. But I by no means desire to rest my opinion on this ground. My view is, that this implied contract, which we are called upon to establish in this case, is a thing unknown to our law; that we are dealing not with a mere mode whereby an acknowledged liability may be enforced, but, a supposed liability having [*664 turned out to be unfounded in law, we are now creating a new species of liability on a new contract, now for the first time to be implied, as to a warranty of authority which, if the party now to be charged had been required expressly to give, he would probably have refused. If it is desirable to establish such a rule, it seems to me it should be done by legislative enactment: and that to establish it by judicial decision is to make the law, which it is only our province to expound. Against this course, though in all humility and with the utmost

deference to the better opinion of my colleagues, I feel it my duty to record my protest.

Judgment affirmed.

The question as to when and in what form of action, one who has expressly contracted in the name and in behalf of another, but without authority to do so, may be made liable to the other party to the contract, has been much discussed in the United States. That the mere assuming to act as agent, without more, amounts to a representation of the existence of an agency, is clear; and where that representation is false within the knowledge of the pretended agent, and is made with a fraudulent purpose, it is directly within the principle of *Pasley v. Freeman*, 3 T. R. 51, and the cognate cases, so that an action on the case for a deceit will lie.

But is there no other remedy? In *Ballou v. Talbot*, 16 Mass. 461, it was held that there was not, and an attempt to hold the agent in an action directly on the contract was defeated. This case, though much observed upon elsewhere, was deliberately affirmed in *Jefts v. York*, 10 Cush. 395; and see *S. C.*, 4 Cush. 371. The ground taken in these cases, as well as in the recent English decisions, is, that as there was originally no intention on the part of the agent to be bound, or of the other party to contract with him, the mutual assent which must be the basis of any express contract, is entirely wanting. On the other hand, in *Dusenbury v. Ellis*, 3 Johns. Cas. 70, it was held that where a promissory note in the first person, is signed in the following manner, "For A. B. Attorney," B. having no authority, in fact is liable directly on the note. This case has been followed in the same and other states, and the current of the American decisions on this subject, now establishes the following propositions:

(1.) In verbal contracts, or at least

in such ordinary ones as the purchase of goods, the hiring of service or the like, and where the pretended agent does or might receive the benefit of the consideration, he is personally liable.

(2.) In written contracts, where the principal only is named in the operative parts of the instrument, no action can be brought upon it, against the agent. But where the instrument, though purporting to be executed by him as agent, does not use language which would exclusively bind the principal, or where, rejecting the words which he had no authority to use, enough remains to create a promise on his part, the pretended agent may be sued directly on the contract. He is, as it were, estopped by his wrongful act from taking advantage of the words of agency in the contract: *Byars v. Doore's Aum.*, 20 Missouri 284; *Royer v. Allen*, 2 Williams Verm. 236; *Bank of Hamburg v. Wray*, 4 Strobb. 87; *Edings v. Brown*, 1 Rich. 257; *Gillespie v. Wasson*, 7 Port. Alab. 461; *Layng v. Stewart*, 1 Watts & Serg. 222; *Hopkins v. Mehaffy*, 11 Serg & R. 129; *Moore v. Wilson*, 6 Foster 335; *Meech v. Smith*, 7 Wend. 315; *Bay v. Cook*, 2 Zabriskie 343; *Pettingell v. McGregor*, 12 N. H. 180; see *Mr. Wallace's note to Rathbon v. Budlong, &c.*, 1 American Lead. Cases.

Whether the agent be liable in case or on the contract, however, does not, in this country, appear to make any real difference in the extent of his responsibility. In either form of action, he is only liable for a fraudulent or wilful misrepresentation of his authority. Where he discloses this authority fully, and acts in good faith, or where his conduct has been only the result of an honest mistake as to the

extent of his powers, he is exonerated: *Sinclair v. Jackson*, 8 Cowen 585; *Ogden v. Raymond*, 22 Conn. 384; *Inhabitants of Webster v. Larned*, 6 Metcalf 528. Certainly where the authority did once exist, but has, without the knowledge of the agent, been revoked by death or otherwise, no liability exists: *Smart v. Ilberston*, 10 Mees. & Welsb. 1. How far the doctrine of that much criticised case, *Cornfoot v. Fowkes*, 6 Mees. & Welsb. 358, that moral as contradistinguished from legal fraud is essential to support an action for a deceit, if adopted in the United States, will be considered as applicable to this class of cases, remains to be seen.

Notwithstanding the thorough examination which the subject has thus received in the American cases, no effort appears to have been made to

hold the agent liable in assumpsit as upon an implied promise of the existence of the necessary authority, nor does that course seem to have been even suggested except in a passing remark in *The Inhabitants of Webster v. Larned*, 6 Metcalf 528. The principal case will probably be received, therefore, with some hesitation in this country, which must be strengthened by the very able dissenting opinion of Sir A. Cockburn. Not the least of the objections which might be urged against the new doctrine are these: that, resting the responsibility of the agent upon contract, it necessarily precludes any defence based on his good faith, and the honesty of his conduct; and that it in effect ignores the distinction between a mere representation and a warranty, which is established by so many decisions.

Sir JOHN BAYLEY, Bart., v. The Hon. W. E. FITZMAURICE.

Defendant employed R., as his agent, to agree with plaintiff for the purchase of plaintiff's leasehold interest in a house. Plaintiff also held stables under a demise distinct from that under which he held the house, and for a longer term. Defendant did not authorize R. to purchase the lease of the stables; and R. had represented to defendant that he had taken the lease of the house only; but in fact R. had taken from the plaintiff an agreement in writing for the purchase of the lease of the house, in which was also the following clause: "I further agree to let to" defendant the stable "for the same rent and subject to the same conditions that I hold them myself." Afterwards plaintiff wrote to defendant stating that such was the bargain, adding that the stables were to be sublet for a term of five years only. This was in fact the same period as the residue of the lease of the house; but it was not so stated in the letter. There was nothing else to indicate for what term the lease of the stables was to be. Defendant wrote and signed an answer, which the Court of Queen's Bench construed to be a ratification of whatever bargain R. had in fact made for him, and to constitute with the previous letters a sufficient signed memorandum in writing to charge defendant with the agreement for the sublease of the stables.

Held by the Exchequer Chamber, reversing the decision of the Queen's Bench, that it did not appear on the face of the writing that the parties were agreed as to the term for which the sublease was to be, and that there was therefore either no complete agreement, or, if there was a complete agreement, no sufficient memorandum of it.

COUNT on an agreement that the respondent, plaintiff below, should sell to the appellant, defendant *below, the residue of the term [665 of the lease of a house called Hamilton Lodge, held by plaintiff for nine years and three quarters of a year, wanting ten days, from 25th December, 1850, with the fixtures and furniture; and also that the plaintiff should grant to defendant an underlease of a stable and appurtenances held by him on lease "for the term of five years, wanting

fifteen days thereof, from 7th November, 1855, being a term less than that for which they were so held by him," at the same rent and subject to the same conditions as the stable, &c., "were then held by plaintiff."

Breach, that defendant would not accept or pay for the leases.

Plea 1, a denial of the agreement, on which issue was joined. There were other issues not material.

On the trial, before Lord Campbell, C. J., at the Middlesex Sittings after Hilary Term, 1856, the plaintiff had a verdict, subject to leave to move to enter a nonsuit. A rule Nisi was obtained accordingly, which was discharged in Trinity Vacation, 1856. Against this decision the defendant now appealed. The case on appeal consisted of the pleadings, and of the evidence on the trial. The pleadings are stated at length in the report of the case below: (a) the course of the argument on appeal renders it necessary to state more of the evidence at the trial than is there stated.

It appeared, on the trial, that the plaintiff held Hamilton Lodge, along with a coach-house and a stable with two stalls, on lease at 180*l.* a year for a term expiring 19th September, 1860. He also held some stables in Gore Lane, about 300 yards distant from Hamilton *666] Lodge, under a different lease from a different landlord, at a rent of 32*l.* 10*s.* per annum, and for a term which would expire at Michaelmas, 1862. There had been some negotiations between the plaintiff, the defendant and Mr. Reardon, a house agent, as to a sale to the defendant of the lease of Hamilton Lodge: and, on the 30th August, the plaintiff wrote a letter to Mr. Reardon, proposing certain terms on which the assignment should be made. On the same day, Mr. Reardon had sent to the plaintiff a different proposal. In neither of these letters was there any allusion to the stables in Gore Lane. The defendant, on the 30th August, saw Mr. Reardon, who showed him the plaintiff's letter of the 30th August; and the defendant then authorized Mr. Reardon to assent to those terms, and to act for him in all matters relating to the valuation of the furniture and fixtures; and he gave him a check to hand over, in part payment, to the plaintiff, if the agreement was made. Immediately after, this defendant left town, not having given Mr. Reardon any other authority to complete the bargain. On the 31st August, the plaintiff and Mr. Reardon had an interview. There was a conflict of testimony between them as to what then took place. Both agreed that the defendant's check was then handed to the plaintiff, who signed a receipt for it as being a deposit for the price to be paid "in accordance with my letter of date 30th August." At the same time the plaintiff gave to Mr. Reardon a new letter, dated 31st August, which is afterwards set out. This letter Mr. Reardon took away with him. The plaintiff's account of what took place at the interview was that Mr. Reardon had said that the stable accommodation at Hamilton Lodge was too small for the defendant; that thereupon plaintiff *667] proposed that he should take the stables, &c., at Gore Lane, and handed the note of the 31st August to Reardon, who said it was just what defendant required, and made the agreement on the terms contained in that letter of 31st August; that plaintiff had signed the receipt without observing that it referred to the letter of 30th August,

(a) See *Fitzmaurice v. Bayley*, 6 E. & B. 868 (E. C. L. R. vol. 88).

instead of 31st August. This the jury found to be the accurate version of what took place. Mr. Reardon did not forward the letter of 31st August to the defendant, who was in the country, and who heard nothing about the stables till he received a letter from the plaintiff, of the material parts of which the following is a copy. "Hamilton Lodge, September 14th, 1855. Sir, I regret to have to trouble you personally on a subject of consequence;" here followed some strongly worded complaints of Mr. Reardon's conduct that morning, and a statement that, after this, "I might be prepared for anything: but I certainly was not prepared to find (if what he states be true) that my letter of the 31st August last, accepting your proposition to me, has never been forwarded to you up to this date. I enclose copies of the same. I shall feel obliged if you will inform me if this be the case: and, if so, all further comment on Mr. Reardon's conduct is unnecessary, as I should think this is an unheard of thing, even in all the looseness of agencies. I hope that between two gentlemen there can be no possible difference of opinion as to your carrying out the proposition made under your sanction by your own agent. You will see by your proposition of the 30th August that it required an immediate answer. I therefore gave my acceptance to Mr. Reardon, personally at his own office, on the 31st August. I read it over to him myself, and thereupon received a check from you in earnest of the whole *thing being carried out. On [*668 taking my receipt, Mr. Reardon offered me a written acceptance of the agreement. I told him your check was sufficiently binding. The stables were inserted at Mr. Reardon's express desire, as he said you had six or seven carriages and would certainly want them. I have refused another party who required them; and there are none others to be had this side Kensington turnpike, which I conceived to be an object to you. This morning, Mr. Reardon brought a letter from your solicitors, wishing for an assignment of the leases. I will inquire of my solicitors if there is anything to prevent your having an assignment of the lease of this house; but, as it was proposed taking the stables for five years only, I cannot give you an assignment of my lease for seven." The letter then contained some complaints of Mr. Reardon's conduct as to the valuation of the furniture, and concluded: "I am preparing to leave the house; and the premises will be given up to you on the 29th September next. May I request that anything you may require to communicate, that does not come from yourself direct, may be made through your solicitors, as I decline holding any communication with Mr. Reardon." Enclosed in this letter were copies of Mr. Reardon's letter to plaintiff of the 30th August, and the plaintiff's letter dated the 31st of August, which were as follows. "91, Piccadilly, August 30, 1855. Sir, As I have the offer of St. Dunstan's Villa, Regent's Park, late the property of the Marquis of Hertford, I am desirous, before I enter upon the treaty, to endeavour to come to terms with you on behalf of Sir John Bayley; and I think the following may be the most likely suggestion to effect that object: namely, to take furniture and fixtures at a fair valuation, which is the *usual mode in these cases, and pay you a premium of 100*l.* for [*669 the lease. Should this offer be accepted, Sir John Bayley will give you a check for the amount before he leaves town. As you asked but 200*l.* for the lease, I think this offer is meeting the matter upon a

fair and equitable footing. I shall feel obliged by your reply in the course of the afternoon, as, in the event of your declining, I must endeavour to arrange terms for St. Dunstan's Villa. I remain, Sir, Your obt. Servt. (Signed) J. REARDON. P. S. I think, if you consult your solicitor on the above proposal, he will at once advise your accepting it; and, should it meet your approval, Sir John Bayley will not require you to paint any part of the house, which will be a considerable saving to you."

"Hamilton Lodge, August 31, 1855. Mr. Reardon: As Sir John Bayley declines my proposition that he should take everything as it stands for 800*l.*, sooner than let the thing fall through I am content that it should go by valuation. I am therefore prepared to accept Sir John Bayley's proposition for him to pay 100*l.* premium for the remainder of the lease of this house for five years, he paying the annual rent of 180*l.* by quarterly payments, and all rates, taxes, &c., from the 29th September, 1855. I further agree to his proposal that the whole of the furniture and fixtures are to be sold by valuation: Mr. Snell to value for me; Mr. to value for Sir John Bayley. I further agree to let to Sir John Bayley the premises in Gore Lane, containing three-stalled stable, coach-house, servant's room, and loft, for the same rent and subject to the same conditions that I hold them myself; and I acknowledge to have received the sum of 50*l.* from Sir John Bayley this day, as *670] part payment of the 100*l.* premium, and as an earnest of his *carrying out these propositions. The furniture, fixtures, and the remainder of the premium, to be paid for on Sir John Bayley receiving his agreement by me. I remain, Yours, faithfully, W. E. FITZMAURICE."

In answer to this letter of the 14th September, the defendant wrote as follows. "Cowes Roads, Saturday, 15th September, 1855. Sir, I have the honour to acknowledge the receipt ashore this morning of your letter of yesterday's date, and hasten to express my deep regret that you should have experienced the slightest incivility from Mr. Reardon, which was contrary to my wishes and instructions; for, in being obliged to leave everything to him, I gave him but one caution, and that was to let me behave throughout in the most gentlemanlike way possible; and I am quite at a loss to account for his departure from my instructions. I have not heard one word from him, or any one else, about Hamilton Lodge since this day fortnight, when I left London; and yours received this morning is the first and only letter I have had on the subject. I am therefore entirely ignorant of all that has occurred since; but of this you may be assured, that I shall not uphold Mr. Reardon in showing the slightest disrespect or incivility to you, and shall be very sorry if anything of the kind has occurred. In answer to your inquiry whether your letter of the 31st August accepting my proposition has ever been forwarded to me, I beg to state that, on the evening of that day, being the night before I left town, he called and told me the business was arranged, and showed me a letter of that date, which I took to be your writing, which is, in substance, very much like the copy you have sent: but, speaking from memory, I do not think it is quite like. In the one I saw I think there was some exception as *671] *to what was to be sold by valuation. One word was 'ornaments;' but it was followed by another word which none of us could read. And I have no recollection that there was anything in it about the stables in Gore Lane. Indeed, until I received your letter

this morning, I had no idea that there were any other stables than the two-stall stable adjoining the garden of the house: and, so fully impressed was I with this idea, that since I have been at Cowes I have been endeavouring to make an arrangement for keeping some of my horses in the country, so that I might be able to do with two only in London, changing horses occasionally. Whether I read the letter, or Mr. Reardon read it to me, I cannot remember; though I rather think I read it myself, because I recollect being puzzled at the word I have before alluded to: however, whichever it was, I returned it to Mr. Reardon and told him to keep it; and I suppose he has it; and, whatever it is, it will speak for itself, and I am fully prepared to carry it out. I beg you will not think another moment about the pianos, but do exactly as you like; for I don't want either of them; and, if I had my choice, I should rather take one than two, as I have a very good one of my own. I shall be quite ready to receive possession on the 29th instant, if agreeable to you to quit at that time. And I should be very glad to know when the business is likely to be settled, because I have been anxious to make a trip to Dover, and another to Devonport, ever since I have been at Cowes, but have been afraid to go away for fear I should be absent when the valuation arrived. I wrote last evening to Mr. Smith, my valuer, to know what progress was making, and when I might expect it, in order to see whether I could get away on Monday; but I cannot get his answer *before to-morrow morning. Again ex- [*672 pressing my regret that you should have suffered any annoyance from Mr. Reardon, and trusting that you will not experience any repetition of it, I have the honour to remain, Your obedient servant, JOHN BAYLEY. To the Honourable Major Fitzmaurice." In fact, the defendant never had seen the letter of 31st August; the letter which he had seen being that of 30th August, in which there was an illegible word immediately following "ornaments," and in which there was no mention of the stables in Gore Lane. A great deal of correspondence ensued, in the course of which this confusion as to the two letters of 30th August and 31st August was made manifest. In the course of it the defendant wrote the letter on which the judgment of the Court below mainly proceeded. In the judgment of the Court below, a passage from that letter was cited as follows: "With respect to the authority I gave Mr. Reardon after his telling me he had got me Hamilton Lodge on terms of valuation, I left everything to him, desiring him to do the best for me he could. What he has done for me I know not; but of course I must support him in all he has done for me, except incivility;" which the Court below construed as a ratification of whatever agreement as to taking the stables had in fact been made by Reardon. It was pointed out, in the course of the argument in error, that the passage in the letter really was: "With respect to the authority which I gave Mr. Reardon after his telling me that he had got me Hamilton Lodge on the terms of *paying 100*l.* and taking the fixtures and furniture at a valuation*, I left everything *else* to him, desiring him to do the best for me he could, and to consult your convenience as far as possible; but that it would suit me best to have possession at Michaelmas. *What he has done [*673 for me I do not know, as I have not heard from him or written to him since I left town; but of course I must support him," &c. It was contended that the words omitted materially qualified the sense of

the passage, which, it was said, ratified only such acts as might have been done by Mr. Reardon in the way of valuing the furniture, arranging as to the time when the plaintiff should give up possession, and other matters collateral to the agreement; and many passages in the correspondence were referred to fortifying this suggestion: but, as the judgment of the Court did not proceed on this ground, they are not further noticed. The case, after setting out the whole evidence given on behalf of the plaintiff, stated that "at the close of the plaintiff's case it was contended, on the part of the defendant, that the first issue was not proved, inasmuch as no evidence had been given of the contract stated in the declaration sufficient to satisfy the provisions of the 4th section of the Statute of Frauds. The cause, however, after some discussion, proceeded." The case then set out the evidence given on the part of the defendant; the effect of which, so far as material, is already stated. The case then concluded: "This being the substance of the evidence on both sides, it was ruled by the Lord Chief Justice that Mr. Reardon had no prior authority from the defendant to take the Gore Lane stables, and that the question for the jury would be whether he did in fact enter into this contract contained in the plaintiff's letter of the 31st of August including the Gore Lane stables; the question being whether Mr. Reardon was to be believed on that point or Major Fitzmaurice. His Lordship also ruled, contrary to what was contended by the defendant's counsel, *674] that there was a sufficient subsequent *ratification by the defendant of the agreement of the 31st of August, and that there was a sufficient memorandum of this agreement within the Statute of Frauds.

"The Lord Chief Justice then reserved the latter point, and left it to the jury to say whether in point of fact Reardon had entered into an agreement with the plaintiff comprising the stables in Gore Lane, and, if so, what damages the plaintiff had sustained by the breach of that agreement. The jury found that Reardon had entered into the agreement which included the stables in Gore Lane, and that the damages sustained by the plaintiff were 125*l.* 10*s.* His Lordship then directed a verdict to be entered for the plaintiff for 125*l.* 10*s.*, reserving leave to the defendant to move to set aside that verdict, and to enter a nonsuit on the ground that there was no sufficient contract in writing signed by the defendant or his agent thereunto lawfully authorized."

The case was argued in the Exchequer Chamber in Michaelmas Term.(a)

Bovill, for the appellant, defendant below.—The defendant's letters, when rightly construed, only confirm the contract contained in the letter shown to him, which it now appears clearly was that of August 30. But, even if his letter bears the meaning attributed to it by the Court below, it does not amount to a sufficient memorandum of the contract declared upon: *Brodie v. St. Paul*, 1 Ves. Jr. 326. The whole contract must be in the writing signed; or else the statute is not satisfied. [BRAMWELL, B.—In *Blackburn On the Contract of Sale*, pp. 48, 49, it *675] is said that, if the signed document in itself *refers to another, the whole is a written memorandum; though "if the reference is to something verbal, or ultimately to a writing by the medium of something verbal," it cannot operate as a memorandum in writing. Is not

(a) November 10th and November 11th. Before Pollock, C. B., Bramwell and Channell, B., and Williams, Crowder, and Willes, J.

that right? And does not the letter here refer to the writing.] Even on that supposition the memorandum is not sufficient unless the writing contains the whole of the terms of the agreement. There is nothing in writing to show the term for which the stables are to be demised: that is an essential part of the agreement: *Clinan v. Cooke*, 1 Sch. & L. 22.

Badeley, for the respondent, plaintiff below.—The jury have found that in fact the agreement made by Reardon with the plaintiff was that evidenced by the letter of 31st August; and the defendant in his letter repeatedly refers to the letter which Reardon had, and ratifies it, whatever it might be. That is a sufficient reference: *Saunderson v. Jackson*, 2 Bos. & P. 238. The question, which letter the reference was to, was for the jury: *Jackson v. Lowe*, 1 Bing. 9 (E. C. L. R. vol. 8). There are many cases to this effect collected in 1 Sugden on Vendors (11th ed.), p. 118; Concise and Practical Treatise, &c. (13th ed.), p. 109. *Brodie v. St. Paul* was a case in which the agreement was that the party should be bound by only that part of the writing which was read over, manifestly introducing all the uncertainty which it was the object of the statute to avoid. The point as to the absence of any statement of the length of the term was not taken at the trial or on the argument below, and is not now open to the appellant. [CHANNELL, B.—It does not seem so much a new point, *as a new argument in support of the point taken at the trial, that there was no sufficient contract in [*676 writing.] The letter being silent as to the term, the law implies a letting from year to year: *Richardson v. Langridge*, 4 Taunt. 128. On that supposition there would be a variance: but that might have been cured by an amendment; and that is an additional reason why the point should not be open now.

Bovill was heard in reply.

Cur. adv. vult.

BRAMWELL, B., in this Vacation (November 30), delivered judgment.

In this case, leave was reserved to the defendant at the trial to move to set aside the verdict for the plaintiff and enter a nonsuit, if there was no contract in writing, according to the Statute of Frauds, sufficient to support the action. The plaintiff had written a letter, dated August 31st, to a house agent named Reardon, containing a statement of the terms on which the plaintiff proposed to sell his interest in a leasehold house, called Hamilton Lodge, to the defendant. Reardon, assuming to act as the agent of the defendant, had orally assented to the terms thus proposed; but in fact without the authority of the defendant as to so much of them as respected certain stables in Gore Lane. On the argument in the Queen's Bench, the contest was whether certain letters subsequently written by the defendant to the plaintiff contained a ratification and adoption of the contract thus made by Reardon, so as to amount to a compliance with the statute. The Court of Queen's Bench decided *in the affirmative, and gave judgment for the plaintiff. On [*677 appeal to this Court, the counsel for the defendant not only denied the correctness of that decision, but submitted to us a new ground of argument which had not been relied upon in the Queen's Bench, and had never been considered by that Court, viz., that the plaintiff's letter of August 31st, even supposing it to have been referred to and duly adopted by the defendant's letters, does not constitute a binding agreement as to the stables in question, because it is silent as to the duration of time for which they were to be let by plaintiff to defendant. These

stables were not part of the Hamilton Lodge tenements which the plaintiff held under a lease which would expire on September 19th, 1860, but were held by the plaintiff under a different lease, granted by a different landlord, which would expire at Michaelmas 1862. Before the letter of August 31st nothing was proved to have passed between the plaintiff and Reardon, or the plaintiff and defendant, either orally or in writing, as to the defendant's proposed tenancy extending to these stables, except that plaintiff had said to Reardon, in consequence of his complaining that the stables belonging to Hamilton Lodge were not sufficient (as the defendant had a great many carriages and horses), that there were stables and a coach-house in Gore Lane which defendant might have, and, further, that Reardon tried to induce plaintiff to accept an offer of 600*l.* for the lease of Hamilton Lodge, with the furniture and fixtures, by saying that defendant would take everything off plaintiff's hands. The letter of August 31st itself contains only the following passage referring to the stables in question. "I further agree to let to Sir John Bayley *678] the premises in Gore Lane, containing *three-stalled stable," &c. &c., "for the same rent and subject to the same conditions that I hold them myself." On the 14th September, Reardon told plaintiff that defendant would not take the stables; and then followed the correspondence between plaintiff and defendant, which began with a letter from the plaintiff dated September 14th, containing the following passage. "This morning, Mr. Reardon brought me a letter from your solicitors, wishing for an assignment of the leases. I will inquire of my solicitors if there is anything to prevent your having an assignment of the lease of this house; *but, as it was proposed taking the stables for five years only*, I cannot give you an assignment of my lease for seven." Nothing further appears respecting any agreement as to the duration of time for which defendant was to hold the stables. If anything at all definite had been agreed on, it seems to have been an underlease for five years, but without any stipulation as to the period from which the five years were to begin. It is therefore doubtful whether the agreement was not incomplete with respect to these stables. At all events, it is plain that nothing is mentioned about the duration of the tenancy of them in the letter which, according to the plaintiff's contention, constitutes the agreement in writing required by the statute: and, consequently, it could not be denied that it fails to support the contract stated in the declaration, wherein it is described, in this respect, as an agreement that "plaintiff should grant to defendant an underlease of a stable," &c., "for the term of five years, wanting fifteen days thereof, from November 7th, 1855." But it was urged by the plaintiff's counsel that this objection was not taken at the trial, and that, if it had been, the declaration might *679] have been amended, so as *to cure the variance, by describing the agreement as a contract to take an underlease from year to year; which, it was argued, was the legal effect of this part of the agreement contained in the letter of August 31st. And, if this were so, we think that such an amendment might well have been made, and that, consequently, the objection could have not been allowed to have been set up at this stage of the case. But we are of opinion that the agreement will not allow of such a construction. It may be that, if an actual demise is made generally, at a yearly rent, though payable half-yearly, or quarterly, and though nothing be said as to the duration of the term,

this would be an implied letting from year to year, according to the dictum of Mansfield, C. J., in *Richardson v. Langridge*, 4 Taunt. 128, 131, which was cited on the argument. The Court, in such a case, would strive to give some effect to the lease, rather than it should be altogether inoperative. But in the construction of the agreement in question, having regard to the surrounding circumstances and the language of the writing, it would be plainly doing violence to the intention if we were to hold that it meant that defendant should take a lease from year to year only. It is plain that either an assignment of the whole term held by plaintiff was contemplated, or else, as suggested by the plaintiff's letter of September 14, an underlease commensurate in duration with the term for which defendant was to hold Hamilton Lodge. The writing itself contains no reference to this: and we are therefore constrained to come to the conclusion, either that there never was any complete agreement as to the duration of the tenancy for which defendant *was to take these stables, or that, if there was, the writing does not [*680 contain it.

It remains to be mentioned that the plaintiff's counsel further contended that, as this point had not been taken either at the trial or on the argument in Queen's Bench, it was too late to rely on it for the first time in this Court. But we are unable to regard this objection to the plaintiff's case as a new point. It is in truth only a new argument in support and illustration of the objection originally made, viz., that there was no agreement in writing signed by the defendant or his agent sufficient to support the action.

On this ground, therefore, we are of opinion that the judgment of the Court of Queen's Bench must be reversed. Judgment reversed.

*MEMORANDA.

[*681

In this Vacation, the following Gentlemen, barristers at law, were appointed Counsel to Her Majesty.

Evelyn Bazalgette, of Lincoln's Inn, Esquire.
 John Shapter, of The Inner Temple, Esquire.
 Samuel Bush Toller, of Lincoln's Inn, Esquire.
 Thomas Webb Greene, of The Middle Temple, Esquire.
 Francis Henry Goldsmid, of Lincoln's Inn, Esquire.
 Richard Paul Amphlett, of Lincoln's Inn, Esquire.
 James Fleming, of The Middle Temple, Esquire.

In the same Vacation,

Sir Cresswell Cresswell, Knight, one of the Justices of the Court of Common Pleas, resigned that office.

He was succeeded by John Barnard Byles, Esquire, Serjeant at Law, who was appointed in the same Vacation, and afterwards received the honor of Knighthood.

END OF MICHAELMAS VACATION.

CASES

ARGUED AND DETERMINED

THE QUEEN'S BENCH,

Hilary Term,

XXI. VICTORIA. 1858.

The Judges who usually sat in Banc in this Term were:

Lord CAMPBELL, C. J.
COLERIDGE, J.

WIGHTMAN, J.
CROMPTON, J.

MEMORANDA.

In this Term, Sir Cresswell Cresswell, Knight, formerly one of the Justices of the Court of Common Pleas, was appointed Judge of The Court of Probate and Judge Ordinary of The Court for Divorce and Matrimonial Causes (stat. 20 & 21 Vict. cc. 77, 85). He was afterwards sworn in a member of The Privy Council.

*683] *In the same Term, the following Gentlemen were appointed Counsel to Her Majesty.

Sir John Dorney Harding, Knight, D.C.L., of The Inner Temple,
Her Majesty's Advocate General.

Jesse Addams, D.C.L., of The Middle Temple.

Robert Joseph Phillimore, D.C.L., of The Middle Temple.

James Parker Deane, D.C.L., of The Inner Temple.

Travers Twiss, D.C.L., of Lincoln's Inn.

ROBERT BECKWITH and WILLIAM HENRY WOOD, Executors of GEORGE WOOLER BECKWITH, v. WILLIAM BULLEN and FREDERICK WILLIAM HANCOCK. *Jan. 12.*

There is no right either at law or in equity to deduct a loss on a policy, underwritten by a testator with a broker, from the amount due to the executors for premiums from the same broker, though the circumstances are such as in case of bankruptcy would support a plea of mutual credit.

A custom that in case of the death of an underwriter the premiums should be retained till all the risks had run off might give such a right. But this Court, in a case where they had power to draw inferences of fact from the evidence, drew the inference that such a custom did not exist at Lloyd's.

COUNT for premiums of insurance due to the testator for having subscribed policies for the defendants, for money received to the use of the plaintiffs as executors, and on accounts stated.

Pleas. 1. Never indebted. 2. Payment. 3. Set-off. 4. For a defence on equitable grounds as to the count for premiums: That defendants employed the testator to underwrite policies for the defendants, and he accepted the employment, upon the terms that, in case any moneys should become payable from testator to defendants on any of the policies for losses, defendants should be at liberty to deduct and retain [*684 as set-off the amount of such losses from any premiums that might be due to testator or his executors; and that a loss exceeding the moneys claimed, before action, became due on one of the policies: wherefore the defendants retained the premiums. Issue was taken on all the pleas.

On the trial, before Lord Campbell, C. J., at the London Sittings after Trinity Term, 1857, the plaintiffs put in mutual admissions, by which it appeared that the defendants were insurance brokers at Lloyd's, and that, unless the defendants succeeded in establishing a counter claim, there was due from them as such brokers to the testator in his lifetime, and to the plaintiffs as his executors, 146*l.* 5*s.* 10*d.*, being a balance due for premiums on policies underwritten by the testator for them as such brokers. That the testator died on 12th December, 1855. That he subscribed for the defendants, on 19th July, 1855, a policy in the name of Bullen and Hancock, "or as agents" on the *Ann Rose*. That the *Ann Rose* became a total loss on the 15th November, 1855, and was on the 28th day of February, 1856, entered as such in Lloyd's books. The plaintiffs' counsel further admitted that the amount recoverable on that policy in respect of the testator's subscription exceeded 146*l.* 5*s.* 10*d.* The plaintiffs, having put in these admissions, called no evidence. For the defence the two defendants were called. Mr. Bullen proved that, though the defendants were agents in making the policy on the *Ann Rose*, they had a *del credere* agreement with their principals, under which they had paid them the full amount: on his giving this evidence, it was not further questioned that the defendants were not only entitled to maintain an action on the policy in their own names, but to retain *what might be recovered [*685 for their own use. He proved that there was no special agreement between the testator and the defendants, but that they dealt in the ordinary manner between underwriter and broker at Lloyd's. In his examination and cross-examination he explained that the customary mode was as follows. The broker now keeps two accounts with under-

writers, called the "credit account" and the "cash account." Till within a few years only one account was kept, which was that now called the credit account. When the slip for any particular policy is signed, it is arranged between the broker and underwriter whether the premium is to go into the credit account or the cash account. In either case the broker becomes debtor to the underwriter for the premium at once; but the time and manner of payment are different in the two cases. If the premium goes into the credit account, it is not payable till the end of the year; if before the end of the year any claim, arising on one of the policies in the credit account, is adjusted by the broker and underwriter, the broker on the adjustment has credit in the account against the underwriter for the amount of the loss thus adjusted, if the *686] account is good for that amount; (a) *and at the end of the year, and not till then, the balance on the account, and the balance only, is due in cash from the broker to the underwriter, under a discount of twelve per cent. If the premium, instead of going into the credit account, goes into the cash account, the custom is the same, except that the account is settled, and the balance is due in cash at the end of each month instead of the end of the year, and the balance is paid under a smaller discount. In neither account is credit ever taken for a claim before it is adjusted, the time at which the loss may have been entered at Lloyd's not being material.

It appeared, by the entries in the defendants' books, that 146*l.* 5*s.* 10*d.* was the balance on 31st December, 1855, after the testator's death, on the credit account between the defendants and the testator. That the premium on the policy on the Ann Rose was carried into the cash account, and was included in the balance struck on that account in August, 1855; and that the first adjustment by any underwriter on that policy was in April, 1856; and that on the 30th April, 1856, the defendants, for the first time, debited the testator's account with the loss. Mr. Bullen also stated that, if any constituent of his refused to adjust a loss when he ought to adjust it, if he had no confidence in the constituent he would refuse to pay over any premiums in his hands whether due or not, but that he did not know that such was the practice of Lloyd's.

Mr. Hancock stated that, if an underwriter improperly refused to adjust a claim which all others adjusted, or if he became bankrupt, or if he failed without becoming a bankrupt, or if he died, whether solvent or not, he should in any one of the cases retain the premiums till *687] *all the risks had run off, without regard to whether the balance was already due or not, and without regard to whether there was any claim on the policies yet made or not, the premiums being to be retained as a security till all the risks on all the policies had run off:

(a) It was not relevant to this case to inquire into the effect of the custom as to settlement, between the broker and his principal, and between the principal and the underwriter. In a case of *Sweeting v. Pearce*, in the Common Pleas, tried at the London Sittings after Michaelmas Term, 1858, in which the question was whether the assured or the underwriter should bear a loss arising from the failure of a broker after the loss had been adjusted and carried to account between the broker and underwriter, but before any payment was made by the broker to the assured, the whole custom was proved in detail. The jury found that the custom existed and had been followed, and that the custom was generally known to merchants, but that this individual plaintiff was not aware of it. On this finding the point was reserved; a rule has since been obtained in the Common Pleas, which is still pending.

and he said that was the custom. It was admitted that application had been made to the plaintiffs in April, 1856, to adjust, and that they had refused. A verdict was directed for the defendants on the 1st and 4th issues, with leave to move to enter a verdict for the plaintiffs, the Court to have power to draw inferences of fact.

Wilde, in Michaelmas Term, 1857, obtained a rule *Nisi* accordingly.

Bovill, *Joseph Brown*, and *Worsley*, now showed cause. (a)—The plaintiffs were beneficially entitled to the policy on the *Ann Rose*. Under the circumstances proved they were entitled to recover exactly as if they were principals: *Grove v. Dubois*, 1 T. R. 112; *Koster v. Eason*, 2 M. & S. 112 (E. C. L. R. vol. 28). [Lord CAMPBELL, C. J.—You may assume, till the contrary is asserted, that the defendants have that right.] Then, the loss being total in fact, the want of an adjustment makes no difference. The effect of an adjustment is only to shift the burthen of proof: *Luckie v. Bushby*, 13 Com. B. 864 (E. C. L. R. vol. 76). [Lord CAMPBELL, C. J.—The fair inference here is, that the amount was due upon the policy, and due to the defendants; but the material part of the defence set up is, that the premiums are not to be payable till the risks have run off.] It is only necessary to say that they are *not payable to the executors of a deceased underwriter till the risks [*688 have run off or been adjusted. There is no evidence to contradict that of the defendant *Hancock*, who says that it is customary to retain the premiums in such cases: and, if such be the custom it forms a defence in equity. [CROMPTON, J.—It cannot be matter of set-off: but, if you can show that it was part of the original contract that the money should not be paid in cash in a particular event which has happened, it is a defence at law.] That is so: *Cleworth v. Pickford*, 7 M. & W. 314; † *Le Loir v. Bristow*, 4 Campb. 134. And, even if there is no defence at law, there is one in equity: *Story on Equity Jurisprudence* (6th ed.), s. 1437 a, vol. 2, p. 931. It may require an agreement to give the equitable set-off; but slight circumstances are sufficient to warrant a Court of equity in presuming such an agreement: *Freeman v. Lomas*, 9 Hare 109, 114.

Wilde and *Blackburn*, in support of the rule.—There can be no equitable right of set-off of matters that are not within the statute of set-off, unless there be an equity to give such a right: *Rawson v. Samuel*, 1 Cr. & Ph. 161. There is no pretence here for any equity, unless there be an agreement; and, if there was such an agreement, it probably would be a defence at law. Set-off is out of the question; for the claim on the policy is not a debt: *Castelli v. Boddington*, 1 E. & B. 66, in Q. B. (b) And mutual credit is also out of the question; for that exists only in cases of bankruptcy. The whole question therefore is, whether the Court, on the evidence, will draw the inference of fact that such an agreement existed. Such an agreement certainly might be *inferred from the mere fact that the testator and the defendants [*689 dealt as underwriter and brokers, if there was an established custom between underwriters and brokers to this effect: but the evidence was not such as to prove such a custom. The evidence of the first defendant was strong to negative its existence. He was a broker, and knew

(a) Before Lord Campbell, C. J., Wightman and Crompton, Js. The argument was resumed and completed before the same judges on January 13th.

(b) Affirmed on error in Exch. Ch.; *Boddington v. Castelli*, 1 E. & B. 879 (E. C. L. R. vol. 72).

of no such custom: if the plaintiffs had called witnesses, they could not have done more than prove that, being brokers who would know of such a custom if it existed, they knew of no such custom. The second witness, it is true, after stating what he himself would do, said that was the custom; and it is not to be denied that this is evidence to go to the jury: but, in weighing it, it is important to see what that practice is which he says is the custom. In this case the underwriter is dead, and the brokers are beneficially interested in the policies, which have been made in their own names; but the evidence of Mr. Hancock did not restrict the custom to these circumstances. He said that in every case where an underwriter either failed, or died, or refused to adjust without ground, or in short for any reason forfeited his confidence, he would hold back the premiums till the risks had run off, and that such was the custom. No one can doubt that all merchants, where they have cross demands of any kind against a creditor who has forfeited their confidence, are in the practice of holding fast the money in their hands; and when it is explained to them that their case is not within the statute of set-off they are not satisfied: but such a practice is not evidence of a custom. If such a custom exists as that which Mr. Hancock proved, if he proved any, it is immaterial whether the policy is in the broker's name or not, *690] and **Peele v. Northcote*, 7 Taunt. 478 (E. C. L. R. vol. 2), was ill decided. And, if the policy is in the broker's name, it is equally immaterial whether he has a beneficial interest or not, and therefore the nice distinctions so elaborately laid down in *Koster v. Eason*, 2 M. & S. 112 (E. C. L. R. vol. 28), were all unnecessary. And the custom would be most unreasonable. Policies often are on distant voyages out and home; so that the risk may continue running for years, during which, it is said, the premiums are to be retained by the broker. Brokers may fail as well as underwriters; and the latter are little likely to have assented to such a custom. If the custom had existed there would be some mention of it in the books: but it is never alluded to, though it would often have been most relevant. *Cur. adv. vult.*

Lord CAMPBELL, C. J., on a subsequent day in this Term (January 15th), delivered judgment.

In this case we were prepared, without regard to the technical form of the equitable plea, to have given judgment for the defendants, if we had thought, upon the evidence adduced, they had either a legal or an equitable defence to the action. But, after full consideration, we think that they have neither. Irrespective of any custom of trade or special agreement, the executors, on the 31st of December, 1856, had a clear right of action for the 146*l.* 5*s.* 10*d.*, the balance of premiums then due; and to this action no set-off could have been pleaded, legal or equitable. There having been no bankruptcy, the defendants could not have sought *691] to avail themselves of the enactment respecting mutual credit. They must therefore contend that, according to the original contract between them and the testator when their dealings began, there was a condition whereby the premiums should not be payable to his executors or administrators till the risks created by the policies he had underwritten for them should all, in mercantile language, be "run off;" i. e. determined or adjusted. We cannot say that such a condition would be contrary to law; and it might be established by clear evidence of the existence of such a custom between underwriters and insurance

brokers in Lloyd's Coffee-House. But the custom is highly improbable; and, extended to cases where the underwriter becomes bankrupt, it would lead to the most inconvenient consequences. At the time of the death or bankruptcy of the underwriter, there may be risks upon policies underwritten by him which would not "run off" for two or three years; and it would be strange if the personal representatives or the assignees could not recover a sum due to him for premiums till, upon a final settlement of all dealings to which he was a party, the exact amount of the sum to be recovered could be ascertained. The executors, if sued by a creditor of the testator, would be much puzzled about pleading that they *have fully administered*: and there would be great difficulty in dealing with an action for premiums commenced by the testator if he should die while there were still risks pending on policies which he had underwritten. Looking likewise to the numerous cases in our books respecting mutual credit and set-off arising from dealings between underwriters and insurance brokers, it is remarkable that no trace of such a custom is to be found, although the custom, if established, would have governed the decision of many of them. To establish the custom in this [*692 case only two witnesses, the two defendants, were called; and one of these could only speak of what he himself had done, or would do, without being able to speak of any custom; and, if such a custom had been generally acted upon at Lloyd's, he might have been expected to be familiar with it. The other defendant certainly did say that, "if there is a total loss exceeding the amount of the premiums due, and the underwriter fails, it is the custom to set-off the loss against the premiums and to pay the balance only; and, where the underwriter dies before the adjustment, it is the practice to let the account run on until the risks are 'run off,' and then to pay or receive the balance." But, exercising the power reserved to us of drawing inferences of fact from the evidence, we do not think that from such evidence the existence of the custom contended for can properly be inferred. In case of the death of the underwriter, if his estate is solvent, it may often be convenient to wait till transactions pending at his death are finally wound up before the executors make a demand for premiums, or the demand of a loss is made upon them: but no instances were given where this course was followed adversely; and we are not satisfied that any such usage as of right has ever existed at Lloyd's. It is unnecessary to comment upon the cases cited; for, although the defendants might have sued upon the policies in their own names, and, in case of bankruptcy of the underwriter, they would have had a defence under the doctrine of *mutual credit* (as we held in *Lee v. Bullen*, (a)) *no case was cited which has a [*693 tendency to show that, irrespective of an express agreement or

(a) *LEE and Others, Assignees of YOUNG, v. BULLEN and HANCOCK.*

This was an action by the assignees of Young for premiums against the same defendants as in the principal case. Young was an underwriter on the policy on the Ann Rose, mentioned in the principal case, and became bankrupt in April, 1856, after the loss was known and the claim made, but before any adjustment. The only material plea claimed to set off the amount due on this policy by way of mutual credit; on which issue was joined.

On the trial, before Wightman, J., at the London sittings after Michaelmas Term, 1857, the jury found that the defendants were beneficially interested in consequence of the del credere guarantee. The verdict was entered for the defendants on the plea of mutual credit, with leave to move to enter a verdict for the plaintiffs.

Wilde obtained a rule Nisi accordingly.—On January 13th, immediately after the argument

established custom, the loss upon a policy unadjusted at the death of the underwriter can be any defence to an action by his executors for premiums due to him in his lifetime.

The verdict must therefore be entered for the plaintiffs on all the issues.

Rule absolute.

In the principal case, the cause was called on; but, it appearing clearly, on reading the notes, that the policy was in the name of the plaintiffs, and that they were beneficially interested, the Court, without hearing the counsel for the defendants, called on *Wilds* and *Hayes*, Serjts., to distinguish the case from *Koster v. Eason*, 2 M. & S. 112 (E. C. L. R. vol. 28); which they were unable to do; and the rule was discharged.

Rule discharged.

*694]

*The QUEEN v. The Justices of GLAMORGANSHIRE.
Jan. 14.

Appeals against orders of adjudication of settlement and maintenance of criminal pauper lunatics, under stat. 3 & 4 Vict. c. 54, ss. 2, 5, are regulated, as to notice and time for appealing, by stat. 11 & 12 Vict. c. 31, s. 9.

Where such an order was served on Guardians of an Union eighteen days before the next Sessions, and the guardians gave notice of appeal after that Sessions, nineteen days from the service: Held, that the appeal was triable at the Sessions next following such notice of appeal.

T. ALLEN, in last Term, obtained a rule calling on the justices in and for the county of Glamorgan to show cause why a mandamus should not issue, commanding them to enter continuances to the next general quarter sessions of the peace to be held in and for the county, upon the appeal of the Guardians of the Poor of the Brecon Union, against an order of Thomas Edward Thomas, Esquire, and the Reverend Samuel Davis, Clerk, two of the said justices, adjudging the last place of legal settlement of John Jones, a criminal pauper lunatic, to be in the hamlet of Traianmawr in the county of Brecon; and at such next general quarter session of the peace to hear and determine the merits of the said appeal.

From the affidavits in support of the rule it appeared that, on 3d June, 1857, the two justices of Glamorganshire, named in the rule, made an order of that date, adjudging the last place of legal settlement of John Jones, a criminal pauper lunatic confined, under the order of a secretary of State, in a lunatic asylum in Glamorganshire, to be in the hamlet of Traianmawr, in Brecknockshire, within the Brecon Union; and adjudging the Guardians of the Union to pay the charges of inquiry and conveyance, and past and future maintenance. On 12th June a copy of the order was served on one of the overseers of the hamlet and *695] on the clerk to the Board of *Guardians of the Union; and a duplicate was also, on 13th June, served on the chairman of the Board. On 30th June the Quarter Sessions for Brecknockshire were holden. On 1st July a notice of appeal, to be commenced and promoted at the then next Quarter Sessions for Glamorganshire, was served, on behalf of the Guardians, upon Thomas Dalton, Esquire, Clerk of the Peace for Glamorganshire; and on 2d October there was also served upon the clerk of the peace, on behalf of the Guardians, a notice of appeal to be commenced and prosecuted at the then next Quarter Sessions, together with grounds of appeal. The next following Sessions

were holden on 20th October: and the appeal was then called on. The counsel for the respondent objected that the Sessions had no jurisdiction to try the appeal. The Sessions, upon this objection, refused to try.

H. S. Giffard now showed cause.—The question arises upon the Act for the confinement of insane prisoners, 3 & 4 Vict. c. 54. Sect. 2 empowers two justices to ascertain the last legal settlement, and make an order on the parish, or (if it is in an union) on the union in which it is comprised, for payment of charges and for maintenance. Then sect. 4 enables a person, feeling himself aggrieved by the order, to “appeal to the justices of the peace at the next quarter sessions of the peace to be holden in and for the county,” &c., “the person so appealing having given to the justices against whose order such appeal shall be made ten days’ notice of his or her intention to make such appeal; and the said justices at such Sessions” are authorized to hear and determine the appeal. By sect. 5, “the overseers of the parish in which the justices shall adjudge any insane *person to be settled, or in case such parish be comprised in a union, or be under the management of [*696 a board of guardians, then either the guardians of such union or parish (as the case may be), or the overseers of such parish, may appeal against such order to the general quarter sessions of the peace to be holden for the county, city, borough, or place where such order shall be made, in like manner and under like restrictions and regulations as against any order of removal, giving reasonable notice thereof to the clerk of the peace of such county,” &c., “who shall be respondent in such appeal, which appeal the justices of the peace assembled at the said general quarter sessions are hereby authorized and empowered to hear and determine in the same manner as appeals against orders of removal are now heard and determined.” “Now” means the time when this Act passed; at that time the appeal against an order of removal must, by stats. 13 & 14 C. 2, c. 12, s. 2, 3 W. & M. c. 11, s. 9, have been to the next practicable Sessions. As the only notice requisite, under stat. 3 & 4 Vict. c. 54, s. 5, was reasonable notice, and as the order was served eighteen days before the June Sessions, those were the proper Sessions for the appeal. But no appeal was then lodged; nor was notice of appeal given till after those Sessions. In the case of an appeal under sect. 4, a ten days’ notice is required. There is nothing to authorize an interval of twenty-one days, the time during which, by stat. 4 & 5 W. 4, c. 76, s. 79, the parish may appeal so as to prevent removal. No removal takes place here at all. The evil at which the enactment last mentioned was pointed was the removal of a pauper to a place which might upon appeal turn out not to be his place of settlement. It is true that sect. 9 of stat. 11 & 12 *Vict. c. 31, allows a notice of appeal within [*697 twenty-one days after notice of chargeability and service of grounds of removal, or fourteen days after the copy of the depositions shall have been, within the twenty-one days, applied for and sent. But that is inapplicable, as relating to cases of removal: and, further, it can at any rate not affect the interpretation of the earlier statute, 3 & 4 Vict. c. 54, s. 5. [CROMPTON, J.—In *Regina v. Justices of West Riding*, 2 L. M. & P. 651, it seems to have been taken for granted that stat. 11 & 12 Vict. c. 31, s. 9, regulated the practice of appeal under stat. 8 & 9 Vict. c. 126, s. 62, the Pauper Lunatic Act. *Montague Smith* (in support of the rule).—That was expressly decided in *Regina v. Justices*

of Glamorganshire, 13 Q. B. 561 (E. C. L. R. vol. 66.) WIGHTMAN, J.—Sect. 62 of stat. 8 & 9 Vict. c. 126, does not contain the word “now.”] That word excludes any interpretation derived from a practice subsequently created.

Montague Smith was not called on to support the rule.

Lord CAMPBELL, C. J.—There would be great inconvenience in interpreting the two statutes as to pauper lunatics differently; and we adhere to the construction put upon stat. 8 & 9 Vict. c. 126, s. 62.

(COLERIDGE, J., had left the Court.)

WIGHTMAN, J.—I think the enactment of stat. 11 & 12 Vict. c. 31, s. 9, overrides the previous practice.

*CROMPTON, J.—If the point were now raised for the first time, *698]. I should feel some doubt: but, when we have a decision on an Act similar to that now in question, much inconvenience would result from adopting a change in the interpretation. Rule absolute.(a)

(a) See *Regina v. Justices of West Riding*, 10 Q. B. 763 (E. C. L. R. vol. 59).

ELIAS, Appellant, v. NIGHTINGALE, Respondent. Jan. 16.

By The Chorley Improvement Act, 1858 (16 & 17 Vict. c. clxxxi., local and personal, public), it is enacted, sect. 84, in language similar to that of sect. 19 of The Markets and Fairs Classes Act, 1847 (10 & 11 Vict. c. 14), that “no person shall slaughter any cattle, or dress any carcase, for sale as human food or food of man, in any places within the limits, other than” such slaughter-house as there described; and that every person who “shall offend by slaughtering any cattle or dressing for sale any carcase within the limits in any place other than one of such slaughter-houses,” shall be liable to a penalty.

Held that this enactment applies only to the slaughtering of beasts intended by the person slaughtering for sale as human food.

THIS was a case stated for the opinion of this Court, under stat. 20 & 21 Vict. c. 43.

At a petty sessions holden at Chorley, in and for the division of Leyland, in Lancashire, on 3d November, 1857, before four justices acting in and for the county in the division aforesaid, William Nightingale, the above-named respondent, was summoned by the appellant under sect. 84 of The Chorley Improvement Act, 1858,(a) which enacts as follows:

“After the expiration of three months from the time when this Act *699] shall come into operation no person shall *slaughter any cattle, or dress any carcase, for sale as human food or food of man, in any places within the limits, other than a slaughter-house which was in use as such before and at the time of the passing of this Act, and has so continued ever since, and has been registered as a slaughter-house under section one hundred and twenty-seven of the Towns Improvement Clauses Act, 1847,(b) incorporated with this Act, or other than a slaughter-house which has been duly licensed by the commissioners, or other than a slaughter-house made or provided by the commissioners under the provisions of this Act; and every person who after the expiration of such three months shall offend by slaughtering any cattle or dressing for sale any carcase within the limits in any place other than

(a) 16 & 17 Vict. c. clxxxi., local and personal, public: “For the improvement of the parish of Chorley, in the county of Lancaster.”

(b) 10 & 11 Vict. c. 34.

one of such slaughter-houses shall for every beast so slaughtered or every carcase so dressed, be liable to a penalty not exceeding five pounds; and the word 'cattle' in this enactment shall have the meaning assigned thereto in the said Markets and Fairs Clause s Act,(a) except that it shall not include horse, mule, or ass."

The information charged that the said William Nightingale, on 22d October last, at Chorley aforesaid, and within the limits of The Chorley Improvement Act, 1853, did slaughter certain cattle, to wit, two pigs, within the said limits, in a certain place other than a slaughter-house authorized by the said Act, contrary to the form of the statute in such case made and provided.

The case proceeded as follows.

"And, the said parties being respectively present at the said Petty Sessions, the said charge was duly heard *by us; and, upon such hearing, we adjudged that the offence charged in the said information was not an offence within the true intent and meaning of the 84th section of The Chorley Improvement Act, 1853: and we did therefore dismiss the same. [*700

"Now we, the said justices, pursuant to application in writing by the said appellant, as is required by the statute 20 and 21 Vict. chap. 43, do hereby state and sign this case.

"At the hearing of the said information the following evidence was adduced on the part of the appellant, namely:

"James Heald, upon his oath, said:

"I am a shopkeeper in Chorley, and know the defendant. On the twenty-second day of October last, I had a pig killed; it was killed in the back yard behind our house. The defendant killed it. I saw him. We sell bacon, ham, and pork at our shop. My premises are in Eaves Lane, Chorley. The pig was slaughtered for sale. I went for Nightingale (respondent), and told him I had a pig to kill, and told him what time to come up.

"Daniel Elias (the appellant), upon his oath, said:

"I am inspector of nuisances in Chorley. Mr. Heald's premises are not registered or licensed as a slaughter-house. I produce by-laws, copies of which have been posted. Last week, I saw defendant. He said he had killed a pig; and Mr. Heald took the responsibility upon himself.'

"And, whereas, upon the said hearing, we the said justices, being of opinion that, in order to constitute an offence against the 84th section of The Chorley Improvement Act, 1853, there must be a slaughtering for *sale, we give judgment in favour of the defendant as aforesaid, there being no evidence that the respondent was cognisant [*701 of any intention to sell.

"And hereupon the judgment of the said Court of Queen's Bench is required, as to whether or not we, the said justices, were correct in point of law in our determination as aforesaid, or as to what shall be done in the premises."

(Signed by the justices.)

Atherton now argued for the appellant.(b)

The respondent did not appear.

The points urged in argument sufficiently appear from the judgment.

(a) 10 & 11 Vict. c. 14.

(b) Before Lord Campbell, C. J., Coleridge, Wightman, and Crompton, Js.

Lord CAMPBELL, C. J., in this Term (January 27th), delivered the judgment of the Court.

In this case the question is, Whether, by The Chorley Improvement Act, 1853, 16 & 17 Vict. c. clxxxi. s. 84 (which follows closely the language of The Markets and Fairs Clauses Act, 1847, 10 & 11 Vict. c. 14, s. 19), it is made an offence, to be punished by a penalty of 5*l.*, to kill a pig, within the limits of the town, in any place other than a public slaughter-house, there being no intention that it should be sold as human food. An information was laid at Petty Sessions against the respondent, charging him with having slaughtered a pig, within the limits of the town, in a certain place other than an authorized slaughter-house, there
 *702] being *no allegation that it was *for sale*. The magistrates held that this did not show any offence within the meaning of the Act: and we are of opinion that they were right in so holding.

These are the words by which the offence is supposed to be created. "No person shall slaughter any cattle, or dress any carcase, for sale as human food or food of man, in any places within the limits, other than a slaughter-house." Looking to these words, we think that, according to their natural and grammatical meaning, no offence is created by slaughtering cattle in the private premises of any inhabitant of the town *unless for sale as human food*; and that, to express this meaning, there was no necessity to introduce the words "for sale as human food" twice over, once after the word "cattle" and again after the word "carcase;" the words, as they stand, applying quite as much to "slaughtering" as to "dressing."

We may put a strained construction on the language of the Legislature if the natural construction would lead to something manifestly unjust or inconvenient, which the Legislature can hardly be supposed to have intended: but it seems to us that the reading of this clause proposed by the appellant imputes to the Legislature an enactment unjust, inconvenient, and inconsistent with what the Legislature had clearly expressed. The statute is represented as making it penal for any inhabitant of Chorley to kill a sucking pig in his own house or yard for the dinner of his family: and, moreover, that, if he has a pig that is dying from *measles* or any other disease, he cannot kill it and bury it in his garden without being liable to a penalty of 5*l.* According to this construction, he must
 *703] first send it to *a public slaughter-house and have it slaughtered, paying the regulated fees, and then bringing it back and bury it.

But the Legislature is likewise charged with what seems to be a strange inconsistency; for, if the animal slaughtered is not to be sold as human food, the carcase may be dressed in the private house or yard of the owner without any penalty being incurred. Are we then to infer that the Legislature intended to require that all the animals mentioned must be killed in a public slaughter-house, and that, as soon as life is extinct in them, their carcases may be brought to a private house or yard, and there dressed, this being the operation from which a public nuisance is chiefly to be apprehended?

The counsel for the appellant hardly contended that he could succeed looking only to the first part of sect. 84, creating the offence: and he chiefly relied upon the latter part of the section, defining the punishment by enacting that "every person who" "shall offend by slaughtering any cattle or dressing for sale any carcase within the limits in any place

other than one of such slaughter-houses shall for every beast so slaughtered or every carcase so dressed, be liable to a penalty," &c. The apportionment of the punishment cannot extend the limits of the offence; and this language does not seem at all sufficient to show that the language used in creating the offence is not used in the sense which *prima facie* it conveys. Through evident carelessness, the collocation of the words is altered; and, instead of repeating the words "or dressing any carcase for sale," we have "or dressing for sale any carcase," making the slaughtering and the dressing liable to the same penalty, but without intimating any intention that the mere killing the animal, whatever may be done with the *carcase, constitutes the first offence, while the second is not complete unless there be a dressing for sale as [*704 human food.

We would only further observe that, in creating new offences, it is the duty of the Legislature clearly to define them; and that, in construing penal statutes, where a serious doubt occurs, we ought to adopt the construction which is favourable to the accused.

For these reasons we think that the respondent is entitled to our judgment. Judgment for the respondent.

The QUEEN *v.* PADWICK. Jan. 16.

As inhabitant of the parish of H. gave notice of appeal to Quarter Sessions against the allowance of the surveyor's accounts. At the Sessions, the Court dismissed the appeal for want of jurisdiction, under stat. 5 & 6 W. 4, c. 50, and ordered the appellant to pay the costs. *Held*, that the Sessions had, under stat. 12 & 13 Vict. c. 45, s. 5, jurisdiction to order the payment of costs. But, *semble*, they would have had no such jurisdiction under stat. 5 & 6 W. 4, c. 50.

MONTAGUE SMITH, in last Trinity Term, obtained a rule calling on the prosecutors to show cause why a recognisance, entered into on 25th April, 1856, by William Padwick, before a justice of Hampshire, and an order of Sessions, made on 30th June, 1856, for the dismissal of the appeal of the said W. Padwick against the allowance of the accounts of William Knight and Charles J. Jenman, surveyors of the highways, and ordering costs to be paid by the said W. Padwick, and an order of Sessions, made on 13th October, 1856, that the said recognisance should be estreated, should not be quashed.

It appeared from the affidavits that William Padwick, an inhabitant of the parish of Hayling South in *Hampshire, had, on 21st April last, given to the surveyors of the highways of the parish [*705 and two justices of the county notice of appeal, to the next general quarter sessions of the county, against the allowance by the said justices of the accounts of the said surveyors. On 25th April, Padwick and two sureties entered into recognisances to appear at the next General Quarter Sessions for the county, "and then and there to try an appeal against" the allowance, "and also to abide the order, and pay such costs, as shall be awarded by the justices of such General Quarter Sessions of the Peace."

At the Sessions held in June and July last, Padwick appeared: and the appeal, which had been duly entered, was called on. The respondent

ents objected that the Sessions had no jurisdiction to try the appeal: and the Court made the following order. "This Court, upon due consideration, doth dismiss the said appeal, being of opinion that it has no jurisdiction to hear the same; and doth order that the said William Padwick, the appellant, shall, on notice given to him of this order, forthwith pay or cause to be paid unto the said Charles Brett and Francis Le Blanc" (the two justices), "the respondents, the sum of 37*l.* 15*s.* 0*d.* for and towards their costs in attending to answer the said appeal."

Notice of the order having been given to Padwick, and costs having been demanded of him, and he having refused to pay them, the Sessions, in October, estreated the recognisances.

Huddleston now showed cause.—The objection made at the Sessions was that, under stat. 5 & 6 W. 4, c. 50, s. 105, there is no right of *706] appeal against the allowance *of the surveyor's accounts; and this is so; (a) and the objection accordingly prevailed. Then arises the question whether the Sessions had, under that section, jurisdiction to give costs. *Regina v. Justices of Warwickshire*, 6 E. & B. 857 (E. C. L. R. vol. 88); may be cited, as showing that, where the Sessions have no jurisdiction to entertain an appeal, they have no jurisdiction to give costs. But, in that case, the only question discussed and decided upon was the jurisdiction to entertain the appeal: it was assumed, without argument, that the costs could not be given if the jurisdiction to hear did not exist. It will be said, here, that the decision of the Sessions was that they could not hear; and, therefore, that the Sessions had not possession of the case. But one question, at any rate, arising on the appeal, was, whether the appeal lay: on that point there has been a decision sufficient to enable the Sessions to give costs. But, further, there was at any rate power to give costs under stat. 12 & 13 Vict. c. 45, s. 5. The words there are: "upon any appeal to any Court of General or Quarter Sessions of the peace the Court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such Court appear just and reasonable." There has here been an appeal to the Court of Sessions, *707] which was brought before the Court; and the Court *has decided against the appellant, though on a preliminary point. In *In re Hill*, 10 Exch. 726,† where it was held that a county court judge could not, of his own accord, reduce a claim below 50*l.* so as to give himself jurisdiction, and a prohibition was granted, Alderson, B., said: "I cannot help thinking that the judge of the county court, when called upon to give jurisdiction, ought not to do what is required for that purpose without making the applicant pay the costs incurred up to that time by the opposite party, who may have appeared to contend that the Court has no jurisdiction." This manifestly assumes that the Court does not, by deciding against its own jurisdiction, lose the power of giving costs: and the discretion intrusted to the Sessions has in the present instance been exercised in conformity with the view thus expressed. And it may be observed that sect. 6 of stat. 12 & 13 Vict. c. 45, authorizes the Sessions, where notice of appeal has been given but

(a) *Regina v. The Justices of the West Riding*, 1 Q. B. 624: nor against a disallowance: *Regina v. Justices of Leicestershire*, ante, p. 557. As to stat. 13 G. 3, c. 78, s. 80, see *Rex v. The Justices of the West Riding of Yorkshire*, 5 T. R. 629; *Rex v. Mitchell*, 5 T. R. 701.

the appeal has not been prosecuted, to give costs to the party receiving the notice.

Montague Smith, *contra*.—The condition of the recognisance is that the appellant will appear at the Sessions and try the appeal, abide the order of the Sessions, and pay such costs as shall be awarded by the Sessions. Now the Sessions has made no order in the matter of the appeal: the Court “doth dismiss the said appeal, being of opinion that it has no jurisdiction to hear the same.” The case is analogous to that of a demurrer to a plea in abatement.^(a) As to the analogy suggested, upon the *authority of *In re Hill*, 10 Exch. 726,[†] from the case of a county court, it was held, in the later case of *Lawford v. Part-ridge*, 1 H. & N. 621,[†] that a county court judge, when a question upon title to land arises, cannot nonsuit the plaintiff nor award costs to the defendant. [CROMPTON, J.—That was a very different question: it arose on sect. 79 of stat. 9 & 10 Vict. c. 95, which gives power to the judge to nonsuit if the plaintiff “shall not make proof of his demand,” and then, if the defendant appears and does not admit the demand, to award costs to him. Lord CAMPBELL, C. J.—That is merely a conditional power.] Sect. 105 of stat. 5 & 6 W. 4, c. 50, gives the power of awarding costs on the Sessions “hearing and finally determining the matter of such appeal:” in this instance there has been no hearing or final determination: in truth there has been no appeal. So stat. 12 & 13 Vict. c. 45, s. 5, gives the power only “upon any appeal;” and the order can be made only on “the party or parties against whom the same shall be decided.” The enactment in sect. 6 is also applicable only where there has been an appeal which could be prosecuted. [He also argued that the order of Sessions was wrong in point of form: but on this the Court pronounced no opinion. *Regina v. Binney*, 1 E. & B. 810 (E. C. L. R. vol. 72), was mentioned.]

Lord CAMPBELL, C. J.—It is properly agreed, on both sides, that the case depends upon the question whether the Sessions had power to award costs. Now, in the absence of express enactment, I should think that they had no such power; for what the Court does, in a case where it has no cognisance, is simply to dismiss the *plaint, or information, or whatever it may be. That being so, the inclination of my opinion is that there was no such power under sect. 105 of stat. 5 & 6 W. 4, c. 50, for the sessions are there empowered to award the costs only “upon hearing and finally determining the matter of such appeal,” that is, upon deciding upon its merits; and we cannot say that this has taken place here. Such was the law until the passing of stat. 12 & 13 Vict. c. 45: and I think that it was unsatisfactory; for there might be the necessity of employing counsel and attending with witnesses in a case where no appeal lies, the decision on that point resting with the Court to which the party was summoned by the notice of appeal. I think the Legislature has, in stat. 12 & 13 Vict. c. 45, s. 5, used language most appropriate to the law then current. The power is given, “upon any appeal,” to “the Court before whom the same shall be brought:” it is not obligatory upon the Court to give the costs; the enactment does not give the respondent an absolute right to them. Now here it is not disputed that the appeal is “brought” before the Sessions.

(a) See *Thomas v. Lloyd*, 1 Ld. Raym. 336; *Garland v. Exton*, 2 Ld. Raym. 992.

Mr. *Smith*, however, properly argues that there is no party "against whom the same" has been "decided." But I think that there has been a decision, not indeed on the merits, but on the question whether an appeal lies; and that has been decided against the appellant. That I think gave a discretion to the Sessions, which they have exercised by giving costs to the respondent. I think that they clearly had the power. Sect. 6 seems rather to extend their power; for it enables them to give costs "upon proof of notice of any appeal," though such appeal be not afterwards prosecuted or entered, but abandoned. It would be strange *710] if the Sessions could *give costs in such a case, and not in a case where the appellant does appear, and argues in support of his right of appeal, and there is a decision against him as to that.

COLERIDGE, J.—I am of the same opinion. The power to give costs can exist only by statutory authority. As to the effect of stat. 5 & 6 W. 4, c. 50, s. 105, I should be inclined to express myself still more strongly than my Lord has done, and to hold decidedly that that statute did not authorize the giving of costs in this case. [Lord CAMPBELL, C. J.—I mean to go that length, too.] Therefore the question must turn on stat. 12 & 13 Vict. c. 45. If you choose to take a very narrow and technical view of the words of sect. 5, Mr. *Smith's* argument may prevail; for it may be said that the words do not extend to any but a legitimate "appeal to any Court of General or Quarter Sessions," and that no appeal has been "decided" against a party where the substance of the appeal has not been decided. But that, I think, would not be the correct view. We are to consider how the law stood at the time when this statute was passed, and that a party might be compelled to undergo costs by an opposite party who went away scathless. Then here are words which, if construed in their ordinary sense, seem to me sufficient. Beyond all doubt this may fairly be called an appeal brought before a Court of Quarter Sessions, and decided by its being dismissed.

WIGHTMAN, J.—The Sessions could give the costs only by virtue of some statute. It is said that here they had no power to do so under stat. 5 & 6 W. 4, c. 50, s. 105, because there has been decision on the merits. The question, therefore, turns on stat. 12 & 13 Vict. c. 45. *711] *That appears to apply; for the appeal has been brought before the Court; and the very question determined was, whether there was jurisdiction or not; and it was determined, in conformity with previous decisions, that there was no jurisdiction. Now sect. 5 of stat. 12 & 13 Vict. c. 45, says nothing as to the merits of the appeal, but only requires that it shall be brought before the Sessions and decided: and then a discretion as to costs is given. The Sessions certainly had power, so far as concerns the getting rid of the appeal; and the object of the enactment is to remedy an evil which may be very extensive, as in the case pointed to by sect. 6.

CROMPTON, J.—I also think that we are well warranted in holding that sects. 5 & 6 of stat. 12 & 13 Vict. c. 45, were intended to remedy the evil which existed in cases like the present. I entertain no doubt that they were intended to apply to all cases, although this has been questioned at the bar, and that the object was to produce uniformity of practice. The legislature divides cases of appeal into two classes: the first, where there is a decision on the appeal; the second, where there has been no decision, and the appeal has not been entered. Section 6

is intended to prevent frivolous appeals. Now an appeal is just as frivolous where there is no jurisdiction to entertain it as where it is brought on bad grounds. The legislature meant to take in all cases, even that where no appeal has been entered. No doubt the appeal has been "brought," within the meaning of the word as used in sect. 5; and it is a fair construction to hold that it has been decided, especially when we look at sect. 6, which gives the power where notice of appeal is proved to have been given. Here the first *question was [712 whether the appeal lay. The Sessions would have been wrong in saying that they could not entertain the appeal; the proper order was, that they dismissed it. The case is clearly within the intention of the legislature.

Rule discharged.

The QUEEN v. MALTY. Jan. 16.

Under stat. 3 G. 4, c. 126, s. 32, and 14 & 15 Vict. c. 38, s. 4, a steam-engine used exclusively for working a thrashing-machine belonging to the same owner, and passing a turnpike-gate at the same time with the thrashing-machine, but in a separate cart, is exempted from toll as an implement of husbandry.

Although the steam-engine be capable of being applied to other purposes.

THIS was an appeal against a conviction for taking toll for a steam-engine at the Old Street turnpike road gate in Upton on Severn, in Worcestershire.

The Quarter Sessions affirmed the conviction, subject to the following case.

On 6th January, 1857, a thrashing-machine, drawn by three horses, and a steam-engine, separate from the thrashing-machine and drawn by three other horses, arrived at the turnpike gate. The thrashing-machine was allowed by the collector to pass through the gate free of toll: but one shilling and three half pence, the proper amount of toll, if any was payable, was demanded for the steam-engine. The driver of the engine, Henry Allen, claimed his exemption as required by sect. 30 of stat. 4 G. 4, c. 95: but the collector insisted upon having the toll; and it was accordingly paid to him by H. Allen. This steam-engine, though capable of being used for other purposes, was employed only, and, when passing through the turnpike gate, was going to a farm to be there employed, to work the thrashing-machine which had just preceded it through the gate. The *toll-collector was summoned by the respondent, [713 H. Allen, the driver of the steam-engine, before the other respondents, who are three of Her Majesty's justices of the peace, and was, by the said justices, convicted of taking illegal toll and fined forty-one shillings.

The collector appealed against this conviction to the Quarter Sessions of the county. And, on the hearing of the appeal, it was contended, on behalf of the appellant, that the steam-engine was not exempt from toll under sect. 4 of stat. 14 & 15 Vict. c. 38, which enacts that the words "implements of husbandry" in the 32d section of the stat. 3 G. 4, c. 126, shall be deemed to include "thrashing-machines," inasmuch as a steam-engine used to work a thrashing-machine is not part of such

machine, but a separate and independent machine for applying the power of steam so as to work the thrashing-machine more beneficially.

The Sessions affirmed the conviction.

If the Court shall be of opinion that the steam-engine was, under the circumstances, exempt from toll as being an "implement of husbandry," the judgment of the Sessions is to be confirmed; otherwise the said judgment is to be reversed, and the conviction quashed.

J. J. Powell, in support of the order of Sessions.—Sect. 32 of stat. 3 G. 4, c. 126, exempts from toll on turnpike roads "any horse, beast, or other cattle or carriage employed in carrying or conveying, having been employed only in carrying or conveying on the same day, any dung, soil, compost, or manure (save and except lime) for improving lands, or any ploughs, harrows, or implements of husbandry (unless laden also with some other thing not hereby exempted *714] from toll:" then stat. *14 & 15 Vict. c. 38, s. 4, enacts that "the words 'implements of husbandry,' in section thirty-six(a) of chapter one hundred and twenty-six of the statute of the third year of King George the Fourth, shall be deemed to include thrashing-machines." "Implement," in Johnson's Dictionary, under the second gloss upon that word, is defined as "Instrument of manufacture; tools of a trade; vessels of a kitchen." Now the whole of the thrashing-machine, including that steam-engine which puts it in motion, is a tool of trade. If any ordinary machine, employed in agriculture, were transported in two separate portions, each portion would be exempt from toll. [COLERIDGE, J.—A thrashing-machine might be perfect without the steam-engine; it might be worked by human hands, or by horses.] It is found that this steam-engine would be applicable to purposes other than those of the thrashing-machine; but that does not appear to be material. [CROMPTON, J.—A spade used in husbandry is an implement of husbandry, though it might be used on a railway.] Steam is now commonly applied to thrashing-machines. [COLERIDGE, J.—Suppose this steam-engine were used for sawing timber.] It would not then be an agricultural implement. [COLERIDGE, J.—Suppose the steam-engine was being carried for the purpose of working a thrashing-machine previously on the farm: would it then be an agricultural implement?] It would, if the thrashing-machine were so; which it is under stat. 14 & 15 Vict. c. 38, s. 4. Even if the case were not within the words of the act, it would be within the spirit. The statute will be construed liberally, being in favour of agriculture. That *principle was acted *715] upon by the Court of Common Pleas in *Higginbotham v. Perkins*, 8 Taunt. 795, 801 (E. C. L. R. vol. 4). Upon a narrow construction, the statute would be inapplicable to such implements as were not in use when it passed. Even so, however, this case would be included; for the use of steam for thrashing-machines was common before the passing of stat. 14 & 15 Vict. c. 38.

Streeten and E. V. Richards, contra.—The construction which is said to be narrow is evidently that of the Legislature: otherwise the thrashing-machine would have been protected by stat. 3 G. 4, c. 126, s. 32, and stat. 14 & 15 Vict. c. 38, s. 4, would have been unnecessary. It is obviously the duty of the Legislature to provide for fresh cases as they

arise, not of the Courts to apply a statute to cases not contemplated by the statute. The argument on the other side would show that, when a thrashing-machine is worked by hand, or by a horse, the man or the horse become implements of husbandry. The same argument would protect a cartload of coke designed for the exclusive use of the engine. [CROMPTON, J.—Suppose the steam-engine and the thrashing-machine had not been severed.] The whole would not constitute an implement of husbandry. If a cart contain anything not exempted, the whole load must pay toll, under stat. 3 G. 4, c. 126, s. 32. [CROMPTON, J.—If a farmer ordered a thrashing-machine to be sent to him, he would, I suspect, expect the steam-engine to be sent as part: I do not think he would mention the two separately.] Suppose that in one cart a thrashing-machine and a cider-mill were *laden, and in another cart a [*716 steam-engine which would work both, surely neither cart would be exempt. In a late case at the Lewes assizes a man was indicted for destroying a thrashing-machine.(a) It appeared that the steam-engine which worked it had been detached, very recently, from the thrashing-machine; and the injury was to the steam-engine only. Bramwell, B., ruled that the defendant could not be convicted. A stoker could not be termed a servant in husbandry. It is common for the owner of a steam-engine to send it round the country for the purpose of its being hired: such an engine cannot be said to constitute a part of every thrashing-machine to which it is applied. It is said that the Act should be so construed as to favour agriculture: but the trustees of turnpike roads have a vested interest in the remuneration to be made for the wear and tear of the road.

Lord CAMPBELL, C. J.—We cannot be influenced by any notion of favouring one class at the expense of another: we are bound to give effect to the intention of the Legislature. Looking only to stat. 3 G. 4, c. 126, s. 32, I should be inclined to think that a thrashing-machine was an implement of husbandry, were it not for the preceding words “ploughs” and “harrows,” which may appear to be applicable only to the tillage of the soil. However, by stat. 14 & 15 Vict. c. 38, s. 4, the words “implements of husbandry” in the former statute are to be deemed to include thrashing-machines. Then comes the question, whether that which is to be used for working the thrashing-machine, and for no *other purpose, is to be exempt. I think that, so far [*717 as regards this question, it is one part of the machine: the two belong to the same owner; they are travelling together: and, if the two were in the same cart, I should have clearly thought that they constituted one implement. If so, I think that the horse drawing the cart containing the engine is exempted. Suppose the thrashing-machine itself were divided into two parts for the sake of convenience, and packed into two small carts: both would be exempted. But I do not confine myself to this view; for I think that, if the steam-engine were used only for the thrashing-machine, it would, though travelling by itself, be exempt. It is clearly distinguishable from a horse, or any animal power which cannot be called an implement: it falls within the definition which has been cited from Johnson’s Dictionary. In the present case the engine was employed to work the thrashing-machine, and

(a) Stat. 7 & 8 G. 4, c. 30, s. 4.

for no other purpose. It is said that the steam-engine might be employed on other occasions: but then it would not be an implement of husbandry. The argument might as well be applied to spades, which would be not entitled to exemption as instruments of husbandry, if, for instance, they were used in mining. Here I think the exemption applicable.

COLERIDGE, J.—On the ordinary principles of construction, I should think that this steam-engine was not an implement of husbandry within sect. 32 of stat. 3 G. 4, c. 126; for the ordinary principle is to connect the words of which we seek the interpretation with the words that are used along with them: and, besides that, we have the inference which *718] is suggested from the *express enactment in the later statute. Also, a steam-engine per se, is not an implement of husbandry. If the exemption is to prevail here, it must be because the steam-engine is part of the thrashing-machine. I think that, on the finding in this case (and I confine myself to that), it is a part of the thrashing-machine. It is employed only for the purposes of the thrashing-machine, and, if permanently connected with it, would beyond doubt be a part of the thrashing-machine; and the whole would then be exempted. Then, if I find the engine separated from the machine and yet employed only for the purpose of that machine, I cannot say that it is not a part of the machine so long as this state of things continues. I am not at present prepared to say that this would be the case (though I do not say it would not) where the owner of a steam-engine went about the country with a steam-engine for the purpose of its being hired for working thrashing-machines.

WIGHTMAN, J.—Whether this exemption could have prevailed before the passing of stat. 14 & 15 Vict. c. 38, is unimportant; for that statute expressly makes a thrashing-machine an implement of husbandry. Therefore the only question is whether the steam-engine here was part of the thrashing-machine. Now the whole went together, as parts of one thrashing-machine: and, if the carriage had been large enough to take in the whole, the whole would be exempt, and it would have made no difference that it was constituted of two parts. Nor, I think, can it make any difference that it was found necessary to divide the parts. Nor is this altered by the circumstance that the thrashing-machine was *719] *capable of being used for other purposes: all parts of a thrashing-machine might perhaps be used for other purposes: still, as in fact the engine was only used for the machine, I think the two constituted only one machine.

CROMPTON, J.—It is found in the case that the thrashing-machine was going along the road with its own steam-engine, not that the steam-engine belonged to a different owner. It seems to be admitted that, if the two were united, the exemption would prevail: and I cannot see what difference it can make that the two are divided. It is very likely that the Legislature meant to declare that the words of stat. 3 G. 4, c. 126, s. 32, are to be interpreted in a wider sense than would be inferred from the words with which they are associated; for, in stat. 14 & 15 Vict. c. 38, s. 4, they do not say “we now enact,” but that the words of the earlier Act “shall be deemed to include thrashing-machines.” That might perhaps authorize us to give a wider construction to the words of stat. 3 G. 4, c. 126, s. 32: but into that we need not go.

Conviction affirmed.

***The QUEEN v. The Inhabitants of CAERWYS. Jan. 16. [*720**

On a case from Sessions, upon appeal against the removal of R. from T. to C. in 1856, it was stated that in 1837 a woman named S. W., "and Ann, aged six weeks, her daughter," were removed by order from P. to C., and that in fact C. was then the place of settlement of both S. W. and Ann: that this order was not appealed against: and that Ann was born in P., and was the same person as R.: that C., the appellant parish, on the trial of the appeal, offered proof of the illegitimacy of R., and that the Sessions held that C. was precluded, by the order of 1837, from giving such proof, and affirmed the order of 1856.

This Court quashed the order of Sessions, holding that C. was not estopped from giving proof of the illegitimacy, inasmuch as, assuming the order of 1837 to assert the fact of legitimacy, that fact was immaterial to the removal of S. W. and Ann, and therefore was not admitted by not appealing against such removal.

On appeal against an order of two justices, removing Ann Roberts, otherwise Williams, from the parish of Tydweiliog in Carnarvonshire to the parish of Caerwys in Flintshire, the Sessions confirmed the order, subject to the opinion of this Court on the following case.

On 19th April, 1837, an order, under the hands and seals of two justices for Carnarvonshire, was made for the removal of Sarah Williams and "Ann, aged six weeks, her daughter," from the parish of Pistill in the said county to the parish of Caerwys. The said paupers were removed to the said parish of Caerwys under this order; against which order no appeal was entered. The said parish of Caerwys was at that time, namely 19th April, 1837, the place of settlement of the said Sarah Williams and her said daughter Ann. On 17th December, 1856, an order, under the hands and seals of two justices of Carnarvonshire, was made for the removal of the present pauper, Ann Roberts, otherwise Williams, from the parish of Tydweiliog to the said parish of Caerwys; against which order the parish officers of Caerwys appealed. The said Ann Roberts, otherwise Williams, is the same person described as "Ann, aged six weeks, her daughter," in the said order of 19th April, 1837: and she was born in the said parish of Pistill about twenty years ago.

*On the trial of the present appeal, the appellants attempted [*721 to prove that the said pauper, Ann Roberts, otherwise Williams, described in the said order of 19th April, 1837, as "Ann, aged six weeks, her daughter," was an illegitimate daughter of the said Sarah Williams; to which the respondents objected, and urged that, inasmuch as the said order of 19th April, 1837, did not disclose the fact of the illegitimacy, it, being unappealed against, was now conclusive of the legitimacy of the said pauper, Ann Roberts, otherwise Williams; and that the appellants were now precluded from proving her illegitimacy: and that therefore the said pauper, Ann Roberts, otherwise Williams, was still settled in the said parish of Caerwys.

The Court of Quarter Sessions, being of this opinion, confirmed the said order of 17th December, 1856,^(a) subject to this case.

Welsby, in support of the order of Sessions.—The order of 1837, being unappealed against, binds the parish of Caerwys: and the description "daughter" means "legitimate daughter." [CROMPTON, J.—If the legitimacy was immaterial, the finding of it is like an immaterial

(a) The order appealed against (of December, 1856), found that "the place of the last legal settlement of the said Ann Roberts, otherwise Williams, is in the parish of Caerwys:" the order of Sessions simply confirmed this order, subject to the case. The form of the order of 1837 did not appear from any documents sent up, further than as stated in the text.

avermment in pleading, which, not being traversable, does not conclude the opposite party. The order of 1837 only removes Sarah Williams and her child, aged six weeks, who would have been removable with her *722] mother whether legitimate or illegitimate.] *The Sessions find as a fact that Caerwys was, at the time of the order of 1837, the place of settlement of both. [CROMPTON, J.—But they have refused to hear evidence of the illegitimacy. WIGHTMAN, J.—The point made at Sessions is that the order of 1837, being unappealed against, is conclusive: but why should it be appealed against? What was the grievance? CROMPTON, J.—We may take the order of 1837 as being properly drawn up, and finding the settlement only of the mother and that the child was six weeks old. COLERIDGE, J.—If the order had removed the child, though within the age of nurture, as to her own place of settlement, there might, I think, have been an appeal.] In *Rex v. Silchester*, Bur. S. C. 551, it was held that an order, removing two persons as man and wife, is, if not appealed against, conclusive of that fact, as against the parish to which the removal is made, and settles them there as such. [COLERIDGE, J.—There the marriage was necessary for the removal. Lord CAMPBELL, C. J.—Without the marriage there was no ground to remove: the fact therefore was not immaterial.]

Boden, contra, was not called upon.

Lord CAMPBELL, C. J.—I think there was no estoppel in this case.

COLERIDGE, WIGHTMAN, and CROMPTON, Js., concurred.

Order quashed.

*723] *JOSEPH HENRY, Appellant, v. The Master, Pilots, and Brethren of The TRINITY HOUSE, NEWCASTLE UPON TYNE. Jan. 16.

Under sect. 352 of The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), a qualified pilot refusing to deliver up his license when required to do so by the pilotage authority, is liable to a penalty, and cannot defend himself on the ground that the pilotage authority has acted capriciously in requiring the delivery.

THIS was a case, heard and determined on 17th November instant, before two justices for the county of the town of Newcastle upon Tyne.

The appellant, a pilot of Sunderland, was summoned by the respondents, charged with a breach of the 352d clause of The Merchant Shipping Act, 1854, by refusing to deliver up his branch or license to the Trinity House Board of Newcastle upon Tyne, being the pilotage authority who appointed him, when required so to do; such offence being punishable under the provisions of the 518th (a) and 520th clauses of The Merchant Shipping Act, 1854.

It was admitted that the port of Sunderland was, by ancient usage, a creek of the port of Newcastle upon Tyne; that the Trinity House of Newcastle upon Tyne was the proper pilotage authority for the appointment of pilots for the port of Sunderland; that the appellant had been appointed by the said Trinity House of Newcastle upon Tyne.

It was proved that the appellant had been summoned to appear, and had appeared, before the Trinity House Board, on the 2d day of Novem-

ber now instant; that he had been required to give up his license, and had refused so to do.

*It was argued by the appellant, in defence, that the requisition to give up his license was an arbitrary proceeding on the part of the Trinity House: and the handbills below set out, and marked A. and B., respectively, which were admitted by the secretary to the Trinity House, and by the Ruler of Pilots of Sunderland, to have been issued by authority of the Trinity House, were put in, and relied upon by the appellant, as proving that he had been required to give up his license on account of his not having paid the sum of sixpence referred to in the said handbill marked A.: and it was contended that the 352d clause of The Merchant Shipping Act, 1854, was to be taken in connection with the 365th, 366th, and 367th clauses of the said Act, relating to the offences of pilots, and gave the pilotage authority no power to require a pilot to produce or deliver up his license in cases in which no offence under the Act, as specified in the said clauses, had been committed. [*724]

The case stated that "We convicted the appellant, upon the ground that the offence with which he was charged was one within the 352d clause; and that we were to look to that alone, as constituting and defining the said offence. The appellant was fined in the sum of ten shillings." The opinion of the Court was desired as to whether the said conviction was right in point of law.

A.

"Notice is hereby given to the Sunderland Pilots,

"That the sixpence per ship unto and out of Sunderland harbour or docks, which the pilots are requested to pay, is for the purpose of creating a fund for the support of old and disabled pilots, and the widows and orphans of pilots belonging to the said port, and defraying the *expenses of the office, on the same principle as the Shields and Newcastle Fund. Any pilot not paying for two months will be [*725] summoned before this Board.

"Trinity House, Newcastle.

"August 18th, 1856.

"ANTHONY NICHOL, Mayor.

"C. E. ELLISON."

"By order,

"JOHN CURRIE, Secretary."

B.

"Pilotage.

"Notice is hereby given to masters and owners of ships, that the following men, namely,

"Joseph Henry" (with four others named),

"have had their licenses to act as pilots cancelled by the Trinity House, Newcastle upon Tyne, and are no longer authorized to act as pilots. Any one employing them in that capacity after this notice will be proceeded against according to law.

"By order,

"C. T. POTTS,

"Secretary to the Commissioners of Pilotage.

J. R. HODGE,

"Ruler of Pilots."

"Sunderland, September 10, 1857.

"ANTHONY NICHOL, Mayor.

"C. E. ELLISON."

Manisty, for the respondents.—The conviction is warranted by sect. 352 of The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which enacts that “every qualified pilot, when required by the pilotage authority who appointed him, shall produce or deliver up his license; and on *726] the death of any qualified pilot the person into *whose hands his license happens to fall shall without delay transmit the same to the pilotage authority who appointed the deceased pilot; and any pilot or person failing to comply with the provisions of this section shall incur a penalty not exceeding ten pounds.” The facts stated bring the case precisely within this clause. It appears that the appellant suspected that the license was required from him for a cause which did not make it incumbent on him to deliver it up: and it will be contended that the license can be taken from a pilot only upon his committing the offences specified in the Act, sects. 365, 366, 367. But sect. 352 is perfectly general: and the pilotage authority appoints only during pleasure. It will not be assumed that the discretion has been improperly exercised: if it has, the improper exercise may be punished.

Mellish, contra.—It is true that sect. 352 is clear and positive: but the power there given has been illegally exercised, in consequence of the pilot refusing to pay the contribution to the superannuation fund: no such fund can be established except by by-law under sect. 333(7). Under sect. 349 and the following sections, the pilot cannot act without a license: to take away a license from a man is therefore to disqualify him from acting as pilot. [WIGHTMAN, J.—Assume that the dismissal was capricious. Lord CAMPBELL, C. J.—According to Mr. *Manisty*’s argument, a dismissal under sect. 352 cannot be illegal.] The terms upon which licenses are to be held must be limited by by-law, subject to the approbation of the Privy Council; sect. 333(4); and this includes *727] the withdrawal or suspension of licenses. *The Legislature cannot have intended to intrust the pilotage authority with an arbitrary power of indirectly revoking the by-laws. [COLERIDGE, J.—Is there an appeal? *Manisty*.—There is only an appeal to Quarter Sessions in the case of a summary conviction inflicting a penalty of more than 5*l.*; sect. 518(4).] That would not enable the pilot to question the mode of exercising the power.

Manisty was not called on to reply.

Lord CAMPBELL, C. J.—I think the conviction was right. However arbitrary the power enforced may be, we must obey the law as the Legislature has enacted it. But, after all, the power is not so arbitrary as has been contended: for the enactment comes only to this, that the authority which appoints a pilot may at any time dismiss him. He holds during pleasure. But, whether such a power be reasonable or not, the law here admits of only one construction. Power is given to the pilotage authority to call upon the pilot, at any time, to deliver up his license; and, if he does not do this when required, he is subjected to the penalty. If Mr. *Mellish* could show that this was inconsistent with any other enactment, that might vary our view: but he has pointed out nothing in the Act which is not consistent with the natural and grammatical construction of sect. 352. As, therefore, the pilot was called upon to deliver up his license, and refused to do so, he is liable to the penalty.

COLERIDGE and WIGHTMAN, Js., concurred.

*728] *CROMPTON, J.—The pilot must deliver up his license when required by the pilotage authority to do so. The pilotage author-

ity may, if it will, abuse the power, which we cannot help seeing to be arbitrary : but the enactment before us is positive.

Conviction affirmed.

In the matter of CHARLES ROBERT BADGER. *Jan. 16.*

A railway company, incorporated by and acting under the provisions of statute, constructed their railway by a viaduct formed of arches of brick-work, and used the viaduct and arches for the purposes of the railway. Afterwards, a space was enclosed under an archway by building walls with gates at each end, and constructing two stories in the enclosed space. The space so enclosed was used by a lessee of the Company as a stable, and not for the purposes of the railway. After the passing of The Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), alterations were made in the enclosing walls. The district surveyor having claimed fees in respect of such alterations, under sect. 49 :

Held, that the fees were not claimable, and the structure not liable to the operation of Part I. of the Act, but exempt, under sect. 6, as a building belonging to a railway company, used for the purposes of such railway, under the provisions of an Act of Parliament; since the archway itself was so used, and the addition did not, of itself, constitute a building : and that this was not the case of an alteration of or addition to an old building, within the meaning of sect. 9, that section applying only where the old building is itself within the operation of the Act.

THIS was a case stated, under stat. 20 & 21 Vict. c. 43, by Isaac Onslow Secker, Esquire, a magistrate of the Metropolitan Police Court sitting at Greenwich.

The South Eastern Railway Company are incorporated by the Local and Personal Act, Public, 6 & 7 W. 4, c. lxxv.(a)

By the Local and Personal Act, Public, 9 & 10 Vict. c. cccv.,(b) the said Company were authorized to make *and maintain a railway [*729 from The London and Greenwich Railway to Woolwich and Gravesend. The said railway has been accordingly made by them, and has been long since opened for, and is now used for, public traffic. It is commonly known as The North Kent Railway.

The said railway, near the Lewisham station thereof, and within the limits to which The Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), extends, is constructed on a viaduct formed of arches of brickwork. The said arches, and the piers thereof, stand wholly upon ground belonging to and held by the Company : and they form an essential part of the viaduct belonging to the said railway Company, and used for the purpose of such railway, under the provisions of stat. 9 & 10 Vict. c. cccv.

The said Company, some time since, and before 1st January, 1856, caused to be erected, at each end of each of three of the said arches, a brick wall, with doors for ingress and egress, and other certain openings in the same. The said brick walls were built wholly upon land of the said Company, and wholly within the said arches respectively. Between the said brick walls, and the piers and crown of the said three arches, were thus enclosed three several spaces, containing two stories respectively, which were permitted by the said Company to be occupied by one William Perriam, and were by him accordingly used and occupied, as

(a) "For making a railway from The London and Croydon Railway to Dover, to be called 'The South-Eastern Railway.'"

(b) "To enable The South-Eastern Railway Company to make a railway from The London and Greenwich Railway to Woolwich and Gravesend."

stables for horses; but the said enclosed spaces were not, nor was either of them, used for the purposes of the railway, except in so far as the Company received payment for the use and occupation thereof from W. Perriam. Afterwards, and after 1st January, 1856, the Company made *730] certain alterations in the brick walls so erected as *aforesaid at the ends of the said three arches respectively. The complainant, Charles Robert Badger, when the said alterations were made, was, and ever since has been, the surveyor appointed in pursuance of The Metropolitan Building Act, 1855, for the district of Lewisham, within which the said arches are situate. And, at the expiration of fourteen days after the completion of the said alterations, he demanded to be paid by the said Company certain fees, to which he claimed to be entitled, as such surveyor, in respect of the said alterations, under sect. 49 of the last-mentioned Act.

The Company having refused and neglected to pay such fees, a summons was, upon the complaint of the said C. R. Badger, issued against, and served upon, the Company for the recovery of the said fees, under sect. 51 of the last-mentioned Act: which said summons was in the words and figures following:

"Metropolitan Police } To the Secretary of the North Kent Railway
District, to wit. } Company, London Bridge Terminus.

"Whereas complaint hath this day been made before the undersigned, one of the magistrates of the Police Courts of the Metropolis, sitting at the Police Court Greenwich, in the county of Kent, and within the Metropolitan Police District, by Charles Robert Badger, for that you, on the 27th day of July in the year of our Lord 1857, in the parish of Lewisham, in the county of Kent, and within the said District, did unlawfully refuse the payment of the sum of 2*l.* 12*s.* 6*d.*, due and owing by The North Kent Railway Company, after the same had been lawfully demanded by the said Charles Robert Badger, as surveyor of the District *731] of Lewisham under *18 & 19 Vict. cap. 122; and which said sum is the amount of certain fees for the alterations of the three adjoining stable buildings respectively situate in the viaduct arches near the Lewisham station, and being in the occupation of Mr. William Perriam: These are therefore to command you, in Her Majesty's name, to be and appear on Saturday next, at 12 o'clock at noon, at the Police Court aforesaid, before me, or such other magistrate of the said Police Courts as may be there, to answer to the said complaint, and to be further dealt with according to law."

(Signed and sealed by JAMES TRAILL, Esquire, 7th September, 1857, at the Police Court aforesaid.)

Upon the final hearing of the said summons, on 10th October in the year last aforesaid, by Isaac Onslow Secker, Esq., one of the magistrates aforesaid, the Company, by their attorney, admitted that they were the defendants in the said complaint, although the said summons was addressed to them under the name and style of "The Secretary of The North Kent Railway Company."

The facts above stated were thereupon proved or admitted; and the said Company further admitted that the alterations, so made as aforesaid, were alterations within the meaning of the 9th section of The Metropolitan Building Act, 1855, if the said stables or enclosed spaces were buildings within the meaning of the said Act, and not exempt from

the operation of the first part of the said Act: and, further, that the sum of 2*l.* 12*s.* 6*d.*, mentioned in the said summons, was the amount of the fees to which the said C. R. Badger was entitled, if the said Company were liable to pay the same: and that all things had been done to entitle the said C. R. Badger to the benefit of the said summons, *if the said Company were so liable. And it was further ad- [732
mitted, by both the parties, that the only question to be deter-
mined by the magistrate was, whether, under the circumstances herein
stated, the said stables or spaces, so enclosed partly by the said arches
and partly by the said brick walls, were or were not buildings within
the meaning of The Metropolitan Building Act, 1855, and whether the
same were or were not exempt from the operation of Part I. of the same
Act.

The magistrate determined the complaint in favour of the complainant, and ordered that the Company should pay the said sum of 2*l.* 12*s.* 6*d.*, together with 2*s.* costs, to the complainant.

The case added: "And the grounds of such my determination were that the said stables or enclosed places were and are buildings within the meaning of The Metropolitan Building Act, 1855; and that the same were not, nor are, exempt from the operation of the first part of the said last-mentioned Act."

Wilde, for the appellant, having stated the case, and *The Respondent*, in person, having pointed out that sect. 103 of stat. 18 & 19 Vict. c. 122, directed that the fees might be recovered in manner directed by stat. 11 & 12 Vict. c. 43, the Court called on the appellant's counsel to state the objections to the conviction.

Wilde, for the appellant.—If this were a building to which the enactments of the statute could refer at all, it would be within sect. 6 in Part I. of the Act, which exempts from the operation of Part I. "the buildings belonging to any canal, dock, or railway company, and used for the purposes of such canal, dock, or railway, under the provisions of any Act of Parliament." But it *is not a building to which the Act [733
is applicable. If it were, then, under sect. 10, if more than half
the arch were taken down by the Company, the rebuilding would be
deemed to be the erection of a new building, and the whole might be taken
down if not in conformity with the regulations of the Act. Such an
interference with the structure of a railway cannot have been contem-
plated by the Legislature. Again, sect. 17 enacts that "every party-
wall shall be carried up above the roof-flat or gutter of the highest
building adjoining thereto," to a certain height; and party-walls are
defined in sect. 3: but this recess could have no party-walls at all.
[WIGHTMAN, J.—Do you say that the Act applies to no buildings that have
not a party-wall?] They must be capable, from their nature, of a party-
wall: the enactment shows the nature of the buildings contemplated.
If this were within the Act, the lower part of the arch would be a party-
wall, which is absurd, because the arch was built alio intuitu. How is
the provision as to the roof to be applied? [Lord CAMPBELL, C. J.—
Suppose an individual chose to erect a building so fantastically con-
structed that many of the regulations would be inapplicable: you would
hardly say that this exempted him from the Act.] The present is a
case in which the inapplicability of the regulations arises from the essen-
tial nature and object of the structure. [*The Respondent*.—The provi-

sions in sect. 17 as to carrying up the walls are confined to erections of combustible materials. But suppose a viaduct were closed in with combustible materials, as wooden gates, the whole would clearly be subject to supervision within the policy of the Act. WIGHTMAN, J.—Suppose part of a station belonging to a railway company were used for an hotel, *734] would the building be within the *exemption in sect. 6? The question would be, what was the paramount object of the building: the principal would carry with it the accessory: and that really is the rule by which this case must be decided. [Lord CAMPBELL, C. J.—Suppose the exemption to be allowed only for the arches and ways.] Without those there is no building. The 1st article of the Preliminary to the First Schedule speaks of buildings as enclosed with walls constructed of brick, stone, &c.: but surely the dry arches of Waterloo Bridge could not be termed a building. By sect. 51 the fees of the surveyor are to be paid at the expiration of “one month after the roof of any building surveyed by any district surveyor under this Act has been covered in;” what meaning could this have if applied to the arch of a railway? Sect. 56 directs that: “whenever any builder is desirous of erecting any iron building, or any other building to which the rules of this Act are inapplicable, he shall make an application to the Metropolitan Board of Works, stating such desire, and setting out a plan of the proposed building, with such particulars as to the construction thereof as may be required by the said Board; and the latter, if satisfied with such plan and particulars, shall signify their approval of the same, and thereupon such building may be constructed according to such plan and particulars; but it shall not be lawful for such Board to authorize any warehouse or other building, used either wholly or in part for the purposes of trade or manufacture, to be erected, of greater dimensions than two hundred and sixteen thousand cubic feet, unless it is divided by party-walls in manner hereinbefore required.” If the Act includes this case at all, it would seem that this is the only section which could be applicable.

*735] *The Respondent*, contra.—There is no absurdity in supposing that the mere walls of an arch constitute a building within the meaning of the Act. But, in the present case, there are floors inserted; and the upper room is used as part of the stable, in fact as a hay-loft; the lower part is used simply as a stable. A dwelling-house might be constructed exactly in the same way; and, in point of fact, many dwelling-houses are so constructed along this railway. The magistrate finds that the structure in this case is not used for the purposes of the railway.

Lord CAMPBELL, C. J.—This case is not free from doubt and difficulty: but, upon the whole, I think that the conviction is wrong and ought to be quashed. I think that these stables, composed of the structure of the railway and the additional walls made to it, would be buildings and subject to supervision, under the Act, unless they were exempted. But the 6th section exempts buildings used for the purposes of a railway company; and here the arches, and all except the new wall and gate and flooring, were used for the purposes of a railway company, and cannot therefore be under the supervision of the surveyor. Then what is left? Only the walls and additions that were built: but they do not make up a building under the Act. The exemption therefore,

although the whole would be otherwise a building under the Act, exempts it from supervision. At the same time, I would strongly advise the owners of buildings, which they propose to alter or erect, when they have any doubt, to avail themselves of sect. 56, and lay the case before the Metropolitan Board and get their sanction. Here, however, the main part erected *is clearly used for the purposes of the railway Company, and not subject to supervision under the Act. [*736

COLERIDGE, J.—I am of the same opinion, though I confess that I have wavered during the argument. But I agree that the conviction cannot be sustained. A structure is occupied for railway purposes: to this walls are added, so as to have a stable below, the upper part being used for the railway. I hardly know what is contended for. Is it, that the whole is brought within the supervision by virtue of the part which is added? I cannot think that that is so: that would lead to many strange consequences, some of which have been alluded to by Mr. *Wilde*. But, if the whole be not under supervision, what is the remainder which is so? Nothing is left but the end-walls and the floor: but does that remainder satisfy any definition of a building which is to be found in the Act? At first I was struck with the respondent's question, whether you could put wooden folding-doors at each end of the archway, and his argument that this could not be done without liability to supervision, because they would be perishable. I think, however, that it could be done. I cannot understand why an enclosure might not be formed in that way, in order to make a place of deposit for a fire-engine, or a wash-house.

WIGHTMAN, J.—The only question is, whether this structure comes within the words of the exempting clause, sect. 6, as "buildings belonging to any canal, dock, or railway company, and used for the purposes of such canal, dock, or railway, under the provisions of any Act of Parliament." Now, no doubt, the arches *are clearly used for the purposes of the railway Company: they might indeed be converted into dwelling-houses by the addition of floors and walls. I had some doubt how far sect. 9 applies. It provides that "any alteration, addition, or other work made or done for any purpose, except that of necessary repair not affecting the construction of any external or party wall, in, to, or upon any old building, or in, to, or upon any new building after the roof has been covered in, shall, to the extent of such alteration, addition, or work, be subject to the regulations of this Act; and whenever mention is hereinafter made of any alteration, addition, or work in, to, or upon any building, it shall, unless the contrary appears from the context, be deemed to imply an alteration, addition, or work to which this Act applies." Now on this a question might be put, whether the Act might not come into operation to the extent of such alteration. But I think that, for this purpose, the addition must be one made to a building not exempt. No doubt, in this case the main object of the whole structure is the support of the railway: and, as has been pointed out, many clauses of the Act are inconsistent with the notion that the structure is within the operation of the Act. Still I come to this conclusion with some doubt.

CROMPTON, J.—After the discussion of this question, I come to the same conclusion as the rest of the Court. Looking to the exempting clause and the rest of the Act, it seems to me impossible to say that the

building is within the operation of the Act. Sect. 6 does not say that the building, in order to be exempted, must be used solely for the purposes of the Company. It appears to give credit to railway companies, *738] and other companies *of that description, for being able to take care of their own structures. Here the arches and roof were for the purposes of the railway, entirely so before the walls were erected, and principally so since the erection; which brings the structure within the exemption. I do not think that sect. 9 assists the respondent: the alteration or addition there spoken of is an alteration of or addition to a building within the Act. On the whole, I think that, the arches and the principal part of the structure not being a building within the operation of the Act, the surveyor had no right of supervision at all.

Lord CAMPBELL, C. J.—There is so much doubt in this case that we shall give no costs. Order quashed, without costs.

JOHN MUNRO v. PHELPS JOHN BUTT. Jan. 18.

By a building agreement between A. and B., it was stipulated that A. should complete for a specified price certain works on certain houses of B., the whole to be completed on a specified day, and to be done to the satisfaction of a surveyor named, upon whose approval payment was to be made. A. failed to complete the work. He sued B. on the agreement for the agreed price, and on a common count for a reasonable price according to measure and value. There was evidence, on the trial, that B. had resumed possession of the houses, and was so far enjoying the fruits of A.'s labour.

Held, upon a rule to set aside a nonsuit and enter a verdict for the plaintiff, that there was no evidence to go to the jury in support of the plaintiff's claim; for that he could not recover on the special count, not having fulfilled it; and that the mere fact of B.'s taking possession of his own land on which buildings had been erected, or where repairs had been done or alterations made to a building thereon, did not afford an inference that he had dispensed with the conditions of the special agreement under which the works were done, or of a contract to pay for the work actually done according to measure and value.

FIRST count: that, before the making of the agreement hereinafter mentioned, one Donelly had contracted and agreed with the defendant that, on or before the 24th day of June, A. D. 1855, unless the defendant *should consent to extend such time, he would, at his own *739] expense, erect and cover in and completely fence in, under the direction or with the approbation of the defendant's surveyor for the time being, on the plot of ground then thereby agreed to be demised, two messuages or dwelling-houses of not less value, when completely finished, than 900*l.* each, in a substantial and workmanlike manner, with good and proper materials, according to the specification and plan signed between the parties; and should and would completely finish the said messuages fit for habitation within six months after the day fixed for the same to be so covered in; and afterwards, to wit, on the 21st day of December, A. D. 1855, it was agreed between the plaintiff and the defendant as follows: that the plaintiff should, within one calendar month from the date of these presents, at his own charge and cost, well and effectually complete and finish the said two houses pursuant to and in accordance with the terms of the said building agreement between the said Donelly and the defendant, and the specification or specifications thereto annexed, and subject as aforesaid to the approval of the

surveyor of the said defendant; that, in the event of the said houses being so completed and finished by the plaintiff as aforesaid, the defendant should pay the plaintiff the sum of 240*l.*: that, for the purpose of the completion of the houses by the plaintiff as aforesaid, the defendant, by the same agreement, consented and agreed with the plaintiff to extend the time fixed for the completion of the said houses by the said Donelly to the 21st day of January, A. D. 1856, and the defendant also undertook that no objection should be raised to any portion of the works then remaining unimpaired, which were executed by the said Donelly *prior to the granting of the certificate therein mentioned by the [740 surveyor of the defendant to the said Donelly, pursuant to the said building agreement; and that time should in all things in the said agreement with the plaintiff contained be considered of the essence of the contract; and the plaintiff hath duly performed the said agreement on his part, except as to the completion of the aforesaid works within the time in that behalf aforesaid; which completion within such time the defendant dispensed with; and the said sum of 240*l.* had become and was due and payable to him before suit; and all things to entitle the plaintiff to payment thereof, and to sustain this action for the non-payment thereof, had before then happened; yet no part thereof hath been paid. Common counts for work and materials, and on accounts stated.

Pleas to the first count: 1. That the plaintiff did not agree as alleged; 2. That he did not dispense with the completion of the said works within the time mentioned; 3. That the messuages or dwelling-houses were not completed and finished to the approval of the surveyor of the defendant. To the common counts: Never indebted.

Issue on all the pleas except the second. To the second and third, demurrers.(a) Joinder.

*The issues were tried before Wightman, J., at the sittings [741 at Westminster in Trinity Term, 1857; when the following facts were proved. The defendant was the owner of certain plots of land, part of the Saint Margaret's Estate at Twickenham in Middlesex. The estate belonged to The Conservative Land Society; and the defendant had become entitled to the plots under the rules of the Association. By an agreement dated the 31st of January 1855, between the defendant and one Donelly, the defendant agreed to demise the said plots of land to Donelly, and Donelly agreed, in consideration thereof, to build upon the said plots two dwelling houses, to be completed on or before the 24th of June 1855. By the agreement the defendant (therein called the

(a) The demurrer was agreed in Hilary Term, 1857, January 23d, before Lord Campbell, C. J., Colridge, Wightman, and Crompton, Js.

Raymond, in support of the demurrer, argued that the pleas objected to were bad, on the ground that the conditions therein relied on were not in this contract conditions precedent to the plaintiff's right to payment. Such stipulations are so unreasonable that the Court will not construe them to be conditions unless it be expressed in the plainest terms. But to say that time is of the essence of the contract is not plain. Every binding stipulation in a contract is of the essence of it, though not a condition precedent. In *Wimshurst v. Deeley* (2 Com. B. 253) (E. C. L. R. vol. 52), the non-completion of an engine within the time specified is treated as the subject-matter of a cross action, though time was there stated to be of the essence of the contract. [Lord CAMPBELL, C. J.—On this demurrer we must take it that there was no waiver of the stipulation as to time or of that as to the certificate. If you have any remedy, is it not on the common count?]

Hugh Hill, contra, was not called on.

Judgment for defendants.

lessor) agreed to advance to Donelly (therein called the lessee) 1200*l.* by instalments, towards the building, &c., the same to be secured by mortgage, &c. The agreement contained a right of re-entry by the lessor in case any of the stipulations in it should not be performed, and particularly in case the houses should not be completed at the date mentioned. The agreement then contained a covenant by Donelly that he would, on or before the 24th of June, 1855, unless the time was extended by the defendant or his assignees, erect, cover, and completely fence in, under the direction or with the approbation of the surveyor for the time *742] being of the defendant or his *assigns, on the said plots of ground in the agreement mentioned, two messuages or dwelling-houses of not less value than 900*l.* each, in a substantial and workmanlike manner, according to a specification and plan agreed upon between the parties, and would completely finish the said messuages fit for habitation within six months after the day so fixed for the same to be so covered in. The defendant by the same agreement covenanted with Donelly that, as soon as the said Donelly had completed fit for habitation the said messuages or dwelling-houses, he would demise them, with the plots of ground, to the said Donelly for a term of 99 years. The works were commenced by Donelly in April, 1855, and were continued until November of the same year; when Donelly was arrested for debt. At that time the works were incomplete; and Donelly was unable to complete them. The houses had before that time been mortgaged to The Conservative Land Society by Donelly, with the assent of the defendant, for moneys advanced by the Society. On the 21st of December, A. D. 1855, the following memorandum of agreement was signed by the plaintiff and C. P. Butt, the son of, and then acting as the agent of and for, the defendant. "Memorandum of Agreement, made the 21st day of December, 1855," &c. "The said John Munro, for himself," &c., "doth hereby agree," &c., "and the said P. J. Butt, for himself," &c., "doth hereby agree," &c.; "in manner and form following, that is to say: that the said John Munro will, within one calendar month from the date of these presents, at his own charge and cost well and effectually complete and finish, or cause to be completed and finished, the two houses and villas, situate at," &c., "called respectively," &c., "and now let on lease *743] by the said P. J. Butt to *one Donelly, such houses or villas to be completed and finished pursuant to and in accordance with the terms of the building agreement made and entered into between the said Donelly and the said P. J. Butt, and bearing date the 16th day of February A. D. 1855, and the specification or specifications thereto annexed, and subject as therein provided to the approval of the surveyor of the said P. J. Butt; that, in the event of the said houses being so completed and finished by the said J. Munro as aforesaid, the said P. J. Butt will pay, or cause to be paid, to the said J. Munro the sum of 240*l.*; and, for the purpose of the completion of the houses by the said J. Munro as aforesaid, the said P. J. Butt hereby consents and agrees with the said J. Munro to extend the time fixed for the completion of the said houses by the said Donelly to the 21st of January, 1856; and also undertakes that no objection shall be raised to any portion of the works now remaining unimpaired which were executed by the said Donelly prior the granting of the last certificate by the surveyor of the said P. J. Butt to the said Donelly pursuant to the said building agreement. It is also

agreed by and between the parties to these presents that time shall in all things herein contained be of the essence of the contract. In witness," &c. In pursuance of this agreement the plaintiff employed workmen to complete the works under the superintendence of Donelly. They were not completed on the 21st, but were alleged to be completed on the 26th of January, 1856; when application for payment of the 240*l.* was made to Mr. C. P. Butt, on the ground that the houses were then complete. He refused to pay without the certificate of his surveyor, who examined the houses, declared them to be incomplete, and refused to give a [*744] *certificate. At that time Donelly was in occupation of the houses, and so continued until and after the 8th of March, 1856; when he was adjudicated a bankrupt. The assignees of Donelly claimed the equity of redemption in the houses, subject to the mortgage thereof to The Conservative Land Society; and their claim was purchased by the defendant for 150*l.* The plaintiff, besides proving these facts, gave in evidence a letter from G. H. Butt, acting for the defendant, to the plaintiff, dated the 7th of February, 1856, in the following terms: "Sir, I have seen Mr. Paxon to-day; but no progress appears to have been made with Donelly's judgment-creditors. Should they refuse to do what we require of them, I shall probably take the course I intended yesterday. My object is to secure your money and my own before letting anything go to the other creditors," &c. The plaintiff then proved a letter from G. H. Butt to Donelly, dated the 19th of July, 1856, in the following terms: "Mr. Butt will be obliged to Mr. Donelly if he will write him a line stating who is at present in possession of Campanile House and Campanile Villa, the property of his, Mr. Butt's father. Mr. B. has heard accidentally of the houses being in possession of a man from London, though Mr. Donelly is not gone out; and Mr. B. would be glad if Mr. D. could inform him what this means, or who the said man from London is," &c. No answer to this letter was read. It was suggested that the person mentioned was a person claiming to take possession on behalf of a Mr. Burgess, as mortgagee from the defendant. The plaintiff then proved another letter from Mr. G. H. Butt to Donelly, dated the 23d of July, 1856, in the following terms: "Many thanks for your firmness in keeping possession of the houses. *When my brother [*745] left England, my father revoked the power of attorney which he had given to him, and executed a similar one to me; so that you can make use of my name as authority for keeping possession," &c. "I do not understand the position in which you are placed: but I imagine that you are perfectly safe in keeping possession till you have a letter from some one who has power to instruct you to resign. That power is now in my hands; and I will act upon my right of attorney according to what I hear from Burgess." On the 9th of August, Mr. G. H. Butt wrote to Donelly. "I have just received the enclosed note from my father. You will see by it that he has no choice left but to request you to withdraw, and let the man sent by Mr. Burgess into full possession of the houses." This letter enclosed one from the defendant to G. H. Butt in these terms. "We have been in error about the man sent to Twickenham by Burgess; there was nothing hostile in the proceeding, which has been properly explained to me; and I have no other course but to request Donelly to withdraw and leave the man in possession. Will you therefore send him instructions accordingly? Perhaps the best

way will be to enclose this note as my authority for the step." It was further proved that in April, 1856, the defendant and his son, C. P. Butt, went over the houses with a Mr. Long, a house and estate agent, and authorized him to let or sell them, and employed him to do some small work in them. No surveyor's certificate was ever procured by the plaintiff. Upon this evidence it was contended at the trial, on the part of the defendant, that the plaintiff could not recover on any count: not on the special count, because the conditions precedent were not fulfilled; *746] not on the common counts, *because there were still other matters open on the special contract than the mere payment of the money, and there was no evidence that the contract was rescinded or that a new contract was undertaken. It was contended, on behalf of the plaintiff, that the defendant was liable upon a quantum meruit to pay for the work actually done by the plaintiff, on the ground that he had taken possession of the houses, and thereby of the work done by the plaintiff thereon. The learned Judge held that there was no evidence to go to the jury to show that the special contract had been abandoned by the parties and a new one substituted, either expressly or by implication, to pay for the work actually done and materials actually supplied according to their value; and he therefore nonsuited the plaintiff, giving him leave to move to enter a verdict, if the Court should be of opinion that there was evidence which ought to have been left to the jury.

H. Hawkins, in the same Term, obtained a rule Nisi accordingly. In the following Term(a)

Hugh Hill and *H. Bullar* showed cause.—The plaintiff could not succeed on the special count for two reasons: first, because the houses were not completed at the stipulated time; and, secondly, because he had not obtained the approval of the defendant's surveyor. Both were determined to be conditions precedent to his right to recover upon that count, on the argument of the demurrer. There was no evidence which *747] ought to have been left to the jury on the common counts. *For, first, there was no evidence that the parties had mutually consented to abandon the special contract; and it was admitted that the plaintiff had not fulfilled his part of it: the special contract therefore remained open; and the plaintiff, not having performed his part of it, could not recover on it on a common, more than on a special, count. And, secondly, if the special contract was not abandoned, there could be no evidence of a substituted contract to pay in another way: that is, to pay for the work actually done and the materials actually used upon a quantum meruit. It is said that the defendant accepted and took the benefit of the work actually done, and the materials actually used, by taking possession of them, and that upon such acceptance there arose an implied contract to pay for them according to measure and value. But, first, there was no evidence that the defendant ever took possession of the houses; and, secondly, if he did, the mere fact of the owner of a house, on which work has been done under a special contract but not according to the contract, taking possession of his own house is no evidence that he accepts such work on the terms of paying for it, not according to the special but according to another contract, namely, a contract to pay for it according to measure and value. If goods are

(a) November 11, 1857. Before Lord Campbell, C. J., Coleridge and Wightman, J.

offered, which were to be supplied according to contract, or a chattel, which was to be made according to contract, the person to whom they are offered can reject them if they are not according to contract; and he can procure others in the market and be indemnified if he be damaged: but the owner of a house cannot reject his house; he must take it; and then he cannot reject the work or materials used in his *house without destroying it, which he is not bound to do. He has no [*748 means of indemnifying himself. The reason therefore for the rule which has been established as to goods and chattels fails in the case of fixed property; and the rule does not apply. If the builder might recover as for measure and value, he might recover more than the contract price. The owner might find himself ruined by a costly and unnecessary work done upon his property without his consent. And, even if in some cases an owner could be called upon to reject work done on his property, yet here the defendant could not reject the plaintiff's work without destroying Donnelly's work, with which the plaintiff's was inextricably mixed up. The authorities are in favour of the defendant. In *Milner v. Field*, 5 Exch. 829,† the plaintiff sought to recover, under a common count, the contract price for work done upon houses under a building agreement requiring, as a condition, a certificate. The Court held that the plaintiff was rightly nonsuited for want of proof of such certificate having been obtained. In *Ellis v. Hamlin*, 3 Taunt. 52, the plaintiff, under a special count framed on a building agreement, sought to recover the agreed price of work done on houses, and failed, because he did not show that he had fulfilled his part of the agreement. He then sought to recover for the value of the work actually done, upon a common count for work and materials. Mansfield, C. J., however, nonsuited the plaintiff, though it was argued, as here, that the defendant had the benefit of the work. The case is cited and approved of in Mr. Smith's note(a) to *Cutter v. Powell*, 6 T. R. 320, *and has never been overruled. The case of *Lines v. Rees*(b) is to the same effect. [*749 The case of *Lucas v. Godwin*, 3 New. Ca. 737 (E. C. L. R. vol. 32), is distinguishable. In that case, the plaintiff recovered on a common count for work done under a building agreement, although the work was not completed on the day specified in the contract. But, first, the jury found that the special contract was induced by the defendant's fraud; so that, in contemplation of law, there was no special contract; and, secondly, the Court held that, upon a true construction of the special contract, the completion of the work at the time specified was not a condition precedent to the plaintiff's right to payment for the work, and that the plaintiff therefore had sufficiently performed his part of the contract.

Raymond, in support of the rule.—If the plaintiff be not entitled to recover on the special contract, either on a special or a general count, for the reasons urged on the other side, yet there was evidence which ought to have been left to the jury in support of his right to recover, on the common counts, a measure and value price for the work actually done and the materials actually used. There was evidence of a mutual abandonment by the parties of the special contract, and of the adoption of a new contract to pay for the work actually done, and the materials

(a) 2 Smith's L. Ca. 17 (4th ed).

(b) 2 Smith's L. Ca., in notes, p. 29 (4th ed).

actually used, on a quantum meruit. There was evidence that the defendant took possession of the houses. The letter of the 23d of July *750] was evidence that Donnelly held the houses for the defendant *by his authority: and the fact of the defendant going over the houses, and directing Long to sell them, was evidence that he then took possession of them. The fact of taking possession of the houses after the contract work was done by the plaintiff was evidence that the defendant abandoned the stipulations as to time and a certificate contained in the special contract, and thereby abandoned that contract. Assume that the special contract was abandoned: and then the remaining facts are, that the plaintiff had done work and supplied materials upon an order by the defendant, and that the defendant had accepted and taken the benefit of such work and materials. Upon such facts there always arises an implied promise by the defendant to pay according to measure and value. In *Chitty On Contracts*, p. 502 (6th ed.), it is said: "But if he" (the plaintiff) "prove a special agreement, and the work done, but not pursuant to such agreement, he shall recover upon the quantum meruit; for, otherwise, he would not be able to recover at all," *Bul. N. P.* 139. "And the measure of damages in such case is, the stipulated price, less the sum which it would take to complete the work according to the agreement." [Lord CAMPBELL, C. J.—How would that apply if the work were done and only the certificate were withheld?] The jury must determine the amount of damage to be deducted, if any, on that ground. [Lord CAMPBELL, C. J.—But, if the price of the work actually done be, according to measure and value, greater than the agreed price, can the builder recover according to measure and value?] In *Lamprell v. Billericay Union*, 3 *Exch.* 283, 306,† *751] the Court held that the defendants *were not bound to pay according to measure and value for the work actually done: but the decision was based on the fact of the defendants being a corporation. It was admitted therefore that, if the case had been between individuals, the acceptance of the work would have been evidence of a promise to pay for it on a quantum meruit. There was, besides, in this case evidence of more than a mere taking possession of the houses. The letter to the plaintiff of the 7th February, 1856, was evidence that the defendant accepted and approved of the work done by the plaintiff. [Lord CAMPBELL, C. J.—Does that letter contain a waiver of the conditions? If it does, may not the plaintiff recover upon the common counts the whole contract price? If it does not, how is the original contract abandoned?] The mode suggested of treating such cases is the only equitable mode. Otherwise the defendant, in such a case, may have the benefit of works of great value, and the plaintiff, for a trifling deficiency, be subject to a total loss.

Cur. adv. vult.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

This was a rule to set aside a nonsuit. The action was brought to recover compensation for work and labour. The work and labour had been done upon two houses of the defendant under a special agreement, two stipulations of which were that the whole was to be completed on a specified day, and that it was to be done to the satisfaction of a surveyor named. The declaration, as to the first of these conditions, both of *752] which had been held on demurrer to be conditions *precedent to the right to recover, alleged a dispensation by the defendant, and

performance as to the latter. The defendant, by his pleas, traversed both the dispensation and the performance. There were, besides, the common indebitatus counts for work and labour and materials; and to these the defendant pleaded *Nunquam indebitatus*. There was clearly no evidence of any certificate by the surveyor, or any other expression that he was satisfied. The plaintiff, therefore, could not recover on the special count: and the main question in the argument before us was, whether there was not such evidence of a mutual abandonment of the special contract, and the substitution of a new implied contract to pay for the work done and materials supplied according to their value, as ought to have gone to the jury. That cases may exist where, the special contract remaining open and unperformed, an action may still be maintained for compensation on a new contract implied by law, cannot now be disputed. The subject is very ably considered, and the cases collected, in the notes^(a) on *Cutter v. Powell*, 6 T. R. 320. But it is unnecessary for us to follow the learned counsel through their argument, because it appears to us that there was no evidence in this case from which such a contract could be properly inferred by the jury. The facts relied on by the plaintiff were that, the work on the house still remaining unfinished, and no certificate having been procured, the defendant had yet resumed possession and was enjoying the fruits of his labour. Of this there certainly was some, though slight, evidence. Now, admitting that in the case of an independent chattel, a piece *of furniture for example, to be made under a special contract, and some [*753 term, which in itself amounted to a condition precedent, being unperformed, if the party for whom it was to be made had yet accepted it, an action might, upon obvious grounds, be maintained, either on the special contract with a dispensation of the conditions alleged, or on an implied contract to pay for it according to its value; it does not seem to us that there are any grounds from which the same conclusion can possibly follow in respect of a building to be erected, or repairs done, or alterations made, to a building on a man's own land, from the mere fact of his taking possession. Indeed the term "taking possession" is scarcely a correct one. The owner of the land is never out of possession while the work is being done. But, using the term in a popular sense, what is he, under the supposed circumstances, to do? The contractor leaves an unfinished or ill-constructed building on his land; he cannot, without expensive, it may be tedious, litigation, compel him to complete it according to the terms of his contract; what has been done may show his inability to complete it properly; the building may be very imperfect, or inconvenient, or the repairs very unsound; yet it may be essential to the owner to occupy the residence, if it be only to pull down and replace all that has been done before. How then does mere possession raise any inference of a waiver of the conditions precedent of the special contract, or of the entering into a new one? If indeed the defendant had done anything, coupled with the taking possession, which had prevented the performance of the special contract, as if he had forbidden the surveyor from entering to inspect the work, or if, the *failure in [*754 complete performance being very slight, the defendant had used any language, or done any act, from which acquiescence on his part

(a) 2 Smith's L. Ca. 29 (4th ed.).

might have been reasonably inferred, the case would have been very different. Here there was nothing of that kind; the reliance of the plaintiff was simply on the defendant's possession.

We were pressed of course with the argument of hardship: it was said to be unjust that the defendant should enjoy the labour expended and materials furnished by the plaintiff. The argument of hardship in a particular case is always a dangerous one to listen to; but in truth there is neither hardship nor injustice in the rule with its qualification: it holds men to their contracts; it admits, from circumstances, the substitution of new contracts; nor is there any hardship in the present case disclosed by the evidence; and a verdict for the plaintiff might work a greater hardship on the defendant compatibly with that evidence.

We think the rule ought to be discharged. Rule discharged.(a)

(a) Reported by W. B. Brett, Esq.

*755] *SEED v. HIGGINGS and Others. Jan. 19.

S. took out a patent for "certain improvements in machinery or apparatus for preparing, slubbing, and roving cotton and other fibrous substances." In his specification he stated that "my invention consists in the application of the principle of centrifugal force in the flyers employed in the above-mentioned machinery, for the purpose of producing the required elasticity or pressure upon the bobbin, by causing the small spur or lever, which conducts the sliver of cotton or other fibrous material on to the bobbin, to press or bear against the same simply by the action of such force." He added: "And in order more clearly to illustrate my invention, and the method of carrying the same into practical effect, I have attached to these presents a sheet of drawings, representing one mode of applying the same to a flyer, as employed in an ordinary roving machine." He then, by reference to the drawings so attached, minutely described a machine. He added: "I would here remark that I do not intend to confine myself to this particular method; but I claim as my invention the application of the law or principle of centrifugal force to the particular or special purpose above set forth; that is, to flyers used in machinery or apparatus for preparing, slubbing and roving cotton and other fibrous materials, for the purpose of producing a hard and evenly-compressed bobbin."

Afterwards, under stat. 5 & 6 W. 4, c. 33, S. entered a disclaimer, reciting that "I have been advised that the claim of my invention, contained in the said specification, may be construed in such a manner as to be more extensive than I intended," and declaring that "I," "for the reason aforesaid, do hereby disclaim all application of the law or principle of centrifugal force as being part of my said invention, or as being comprised in my claim of invention, contained in the said specification, except only the application of centrifugal force by means of a weight acting upon a presser so as to cause it to press against a bobbin, as described in the said specification."

Held, by the Court of Queen's Bench, that this disclaimer was valid under the statute, and that, the original specification and disclaimer being taken together, the result was a claim for only the machine particularly described. Held a correct view, by the majority of the Exchequer Chamber, the Court consisting of Williams, J., Martin, B., Willes, J., Bramwell, B., Watson, B., and Byles, J.

But held unanimously, by the Exchequer Chamber, that, on this view, the patent was not infringed upon by a machine differing from the machine particularly described. As, where S.'s machine produced the pressure by a centrifugal force urged by a weight attached to a lever projecting horizontally from the top of a vertical leg, but in the other machine the weight was partly distributed along a vertical flyer: though the two machines produced the same result by an application of the same principle.

THE declaration alleged that plaintiff was the first and true inventor of a certain new manufacture, (that is say), of certain improvements in machinery, or apparatus for preparing, slubbing and roving cotton, and

other fibrous substances: and thereupon the Queen, by letters patent, granted plaintiff the sole privilege to make, use, exercise and vend his said invention within England, Wales, and Berwick upon Tweed, for the term of fourteen years from the 14th July, 1846, subject to *a [*756 condition that plaintiff should, within six calendar months, cause to be enrolled in Chancery an instrument in writing, under his hand and seal, particularly describing and ascertaining the nature of the said invention, and in what manner the same is to be performed: and plaintiff did, within the time prescribed, fulfil the said condition; and afterwards, and before the infringement of the said patent right hereinafter mentioned, to wit, on 23d August, 1854, plaintiff, having first obtained the leave of Sir Alexander James Edmund Cockburn, Knight, Attorney-General, certified by his fiat and signature, did, according to the statute, &c., duly enter with the clerk of the patents of England a disclaimer of certain parts of the specification enrolled by plaintiff in Chancery, in pursuance of the said letters patent, stating therein the reason for such disclaimer: and thereupon the said disclaimer was filed by the clerk of the patents, and was also enrolled with the said specification, and was not such a disclaimer as could or did extend the exclusive right granted by the said letters patent: and defendants afterwards, and during the said term, did infringe the said patent right, and continue to infringe the same; and plaintiff is personally interested in the said patent right: and plaintiff has demanded and requested of defendants to forbear from, and not to infringe, the said patent right: but defendants have refused and neglected, and still refuse and neglect, to comply with such demand, and continue, and threaten to continue, to infringe the said patent right. And plaintiff claims as well 1000*l.*, as also a writ of injunction, and also that an account may be kept of all profits which have been, or which during the pendency of this suit may be, made or obtained by defendants by the infringement: and [*757 *that defendants may be ordered and compelled to pay the amount of all such profits to plaintiff.

Pleas: 1. Not guilty.

2. That plaintiff was not the first and true inventor of the alleged invention.

3. That the alleged invention was not, at the time of the making of the letters patent, a new invention within this realm.

4. That the alleged invention was not, nor is, the working or making of any manner of manufacture for which letters patent can by law be granted.

5. That plaintiff did not, within six calendar months next and immediately after the date of the letters patent, cause to be enrolled in the High Court of Chancery an instrument in writing, under his hand and seal, particularly describing and ascertaining the nature of the alleged invention, and in what manner the same was to be performed.

6. That the disclaimer extends the exclusive right granted by the letters patent.

7. That the invention described in the specification, as altered by the disclaimer, is another and a different invention from that for which the patent was granted.

Issues on these pleas.

On the trial, at the London Sittings after Trinity Term, 1857, before

Lord Campbell, C. J., plaintiff gave in evidence the letters patent mentioned in the declaration, and also the specification of the invention, mentioned in the letters patent, enrolled in Chancery within six months after the date of the letters patent, and the disclaimer and memorandum of alteration, entered, filed, and enrolled on 28th day of August, 1854.

*758] By the specification, the invention was described as *being "of certain improvements in machinery or apparatus for preparing, slubbing, and roving cotton and other fibrous substances." And the plaintiff did thereby "declare that the nature of my said invention, and the manner in which the same is to be performed, is particularly described and ascertained in and by the drawings hereto annexed, and the following explanation thereof, (that is to say): My improvements in machinery or apparatus for preparing, slubbing, and roving cotton and other fibrous substances, apply solely to that part of such machinery called the flyer, which is employed in connection with the spindle for the purpose of winding the sliver or roving upon the bobbin. My invention consists in the application of the principle of centrifugal force in the flyers employed in the above-mentioned machinery, for the purpose of producing the required elasticity or pressure upon the bobbin, by causing the small spur or lever, which conducts the sliver of cotton or other fibrous material on to the bobbin, to press or bear against the same simply by the action of such force, instead of being effected by springs or such other mechanical pressure. By the application of this invention the bobbin of rovings will not only be made hard, but equally compressed throughout, as the pressure upon the same will be found to decrease slightly as the diameter of the bobbin increases, and thus equalize the formation thereof, instead of having the outer or finished diameter made harder than the interior, which has hitherto been the case. And in order more clearly to illustrate my invention, and the method of carrying the same into practical effect, I have attached to these presents a sheet of drawings, representing one mode of applying the same to a flyer, as employed in an *ordinary roving machine." (Here followed a description of the different drawings, which it is not necessary to set out, except as follows; the principle of the design appearing from what is stated.) "a, a, is the spindle; b, b, the bobbin; c, c, the flyer. To one or both of the legs of the flyer c, c, are attached two or more fixed bearings d, d, supporting the guide or pressing apparatus e, f, g, formed of wire. The lower part or portion e of this wire is bent and formed into a small spur or lever, for the purpose of conducting and delivering the sliver or roving of cotton, &c., on to the bobbin, and the vertical portion of the wire swivels loosely in the bearings d, d, attached to the hollow flyer leg; the upper end g is also bent into the form shown in the drawing, and has a small weight h attached thereto. It will thus be evident that as the flyer c, c, revolves at a high velocity, the weight h upon the upper end of the wire will be thrown from the centre, and cause the spur or lever e at the lower end of the wire to bear or press against the bobbin b, b, the pressure slightly decreasing as the increasing diameter of the bobbin causes the weight h to approach the centre of rotation. The above apparatus represents one particular and practicable mode of applying my invention; but I would here remark that I do not intend to confine myself to this particular method; but I claim as my invention the application of

the law or principle of centrifugal force to the particular or special purpose above set forth; that is, to flyers used in machinery or apparatus for preparing, slubbing and roving cotton and other fibrous materials, for the purpose of producing a hard and evenly compressed bobbin."

The specification was executed on 12th January, 1847, and was enrolled on 14th January, 1857.

Afterwards the plaintiff entered a disclaimer. The *recital stated: "Whereas I have been advised that the claim of my [760 invention, contained in the said specification, may be construed in such a manner as to be more extensive than I intended, and by reason thereof I am desirous of making and extending the disclaimer hereinafter expressed or contained, for the purpose of preventing any doubt with respect to such construction of my said specification and the said claim, and therein contained." The instrument then stated that "I, the said William Seed, for the reason aforesaid, do hereby disclaim all application of the law or principle of centrifugal force as being part of my said invention, or as being comprised in my claim of invention contained in the said specification, except only the application of centrifugal force by means of a weight acting upon a presser so as to cause it to press against a bobbin, as described in the said specification; and I hereby declare that the above written disclaimer is not intended to extend the exclusive right granted by the said letters patent, and shall not extend the said exclusive right in any way whatsoever."

This instrument was executed on 12th August, 1854, and filed on 23d August, 1854.

In support of his case the plaintiff, besides other evidence, gave the following. (a)

William Carpmael deposed: "I am a civil engineer and patent agent. This is a model of three spindles: and on one of them is put an ordinary flyer. The cotton descends down the centre of the ordinary flyer. We are now supposed to be making a roving, what may be called a cop or bobbing of roving by this flyer-frame. The problem to make a bobbin is winding a roving of *cotton on to a bobbin. The spindle is [761 caused to rotate quickly, carrying round with it the flyer. This is the old mode of doing it, with a simple flyer carrying round with it the flyer, which, by one of its legs, delivers the roving to the surface of the bobbin; and, by reason of the bobbin being caused to rise and fall within the legs of the flyer, the roving is laid spirally round the bobbin till the bobbin becomes full. This is the old mode of using a frame of this sort, before any pressure was applied. The presser was an addition to the apparatus. It was found desirable to apply a pressure for pressing the roving, in order to get greater hardness of winding or closeness of winding. That" (pointing to a part of the model) "is the old bobbin; and this" (pointing to another part of the model) "is the new one. And the new one is much more compact, and consequently carries more. The kind of presser in use before the plaintiff's invention was a presser pressed upon by a spring, the presser being applied to one of the legs of the flyer. It was a sort of lever finger, which was, at the lower end of the old flyer, pressed upon constantly by a spring tending to force the outer end of the finger inwards. There were various forms of

(a) This statement of the evidence is taken from the case as stated on appeal.

springs. The faults of the spring-presser were: first, the spring commenced with the weakest effort at starting, and got stronger and stronger, so that the outer circumference of the winding was more hardly pressed than the inner one, and so that the interior of the winding was weak as compared with the exterior; the second objection was that no two of the instruments could wind with a like degree of elasticity, by reason of the difference of elasticity of different springs. The effect of what I have described was that, the interior being softer than the outer part of the *762] *bobbin, it had a tendency to press out the interior: that was an objection. The revolutions of the flyers are from 1200 to 1500 a minute. I have not counted them for some time. They revolve at a very high velocity. This is a model of the plaintiff's presser. It has no spring at all. It works by centrifugal action. There is a similar presser to what is used when the spring is employed; the back end of which rises perpendicularly up the leg to the flyer, and is retained to it by means of two bearings; and a weight is fixed at the upper end: hence, when the flyer is put into quick rotation, the flying off of the weight from the centre of the spindle causes the presser to press against the bobbin. It produces great evenness, commencing rather with the hardest and ending with the softest winding. If you revolve it very slowly, no effect takes place; because centrifugal action is not called into existence: therefore this" (the presser) "would not press against this" (the bobbin) "for some time" (describing on the model). "The object is to wind the cotton upon this bare bobbin. And, the moment it goes at any velocity, this" (pointing to the presser) "flies inwards by reason of this weight" (pointing to the weight at the top of the plaintiff's presser) "flying outwards. To show the strength of the holding of it, you will see that it actually holds a piece of wood on the bare spindle: it would not drop, by reason of the friction. Now the wood is wholly held up by the adhesion of the finger of the presser, by the flying off of the weight from the centre of the spindle" (witness described the operation on the model). "I have read the specification. The construction of that" (pointing to the plaintiff's presser) "is very clearly shown and *763] described in the drawing. In Mr. Seed's *machine, the weight does not work in the same plane as the presser-finger: it is carried up the leg of the flyer to the upper part. The flyer does not occupy a larger space than the ordinary flyer. That arrangement of Mr. Seed's gets rid of the vibration and the shaking which I spoke of. I have seen a model of the presser which is used by the defendant; and the action of that is by centrifugal force. The similarity between that and Mr. Seed's is, that the weight is carried up the leg of the flyer: but the defendant does not carry the mean of the weight at the top; he makes his weighty all the way up. I have described that, as to the advantages of the plaintiff's, there is no shaking, and also that the room it takes up is less. It occupies the like room of an ordinary flyer. I have pointed out the difference between the plaintiff's and the defendant's. Mr. Seed does not distribute his weight, but carries it to the top: the defendant carries only part to the top, and distributes it all the way. I think that is not any substantial difference. It has the essential feature of Mr. Seed's in carrying the weight from the bottom of the leg up the leg, and preventing the large excess of weight at the end of the leg, which previously existed in Mr. Dyer's patent. It pre-

vented the effect of the whole of the weight being at the end of the leg, as in Mr. Dyer's case."

Charles May deposed as follows: "I am a civil engineer, and a fellow of the Royal Society. I have seen the plaintiff's presser. The distinctive property of the plaintiff's presser consists in the application of the centrifugal tendency of the weight, that weight being supported at a higher point than the plane of rotation of the pressing finger. I have seen the model of the *defendant's presser. The defendant's [764] presser so far resembles the plaintiff's in the peculiar distinctive quality of bringing the weight nearer to the source of motion, if I may so term it: and, by bringing it higher up the leg, there is less tendency to create that vibration which I believe was fatal to Dyer's presser. That was, I consider, the distinctive property and advantage of the plaintiff's. The defendant's is what may be called a little more than half way between Dyer's and Seed's. It may be said to be a little more than half way. It gives the peculiar advantages of the plaintiff's in a great measure. The defendant's flyer is something between Seed's and Dyer's. The weight is thrown along in the same direction as the leg of the flyer. That will not be more effectual in preventing unsteadiness than putting the weight at the top. I think putting the weight at the top is the most effective. I think there cannot be a question about that on mechanical principles. The defendant's flyer is something between Seed's and Dyer's: it does not more resemble Dyer's than Seed's. As I said before, it is rather more than half way between Seed's and Dyer's. It is rather more Seed's than Dyer's. I think, if the weight had been brought below the half here" (pointing to the model of the defendant's flyer), "that would have been rather more Dyer's than Seed's. Every approach to the lower part of the leg I consider a deterioration." The defendant's counsel then put the following questions to the witness and received the following answers. Q. "Now, in other respects, it a great deal more resembles Dyer's than Seed's: for instance, it is upon the leg of the flyer, is it not?" A. "It certainly is." Q. "In Seed's it is not: it is on a separate piece of machinery." A. "It is upon a separate axis. It is upon the leg of *the flyer. In Seed's it is not: [765] it is upon a separate axis."

John Miller deposed as follows: "I am manager of Messrs. Harrison and Son's manufactory at Staley Bridge. As manager for Messrs. Harrison, I ordered some flyers of the defendants, Messrs. Higgins. We afterwards received them. I have a flyer here" (the witness produced a flyer). "This is one of them: we received it on the 16th April, 1855. It was in all respects made as I now have it when we received it." Cross-examined. "I did not go to the defendants' works when I gave the order. I was not at the defendants' works at all, when the order was going on or executed. The defendants live at Manchester."

At the close of plaintiff's case, it was objected, for defendants, that the specification, as altered by the disclaimer, described and claimed an invention different from that for which the patent had been granted. The Lord Chief Justice overruled the objection, but reserved the point for the consideration of this Court.

It was also contended, for defendants, that, if the invention, described in the specification as altered by the disclaimer, was limited to the particular mode of applying centrifugal force described and shown in the

disclaimer, specification, and drawings, there was no evidence for the jury of any infringement. The Lord Chief Justice overruled the objection, and left the question of infringement to the jury.

Verdict for plaintiff on all the issues, subject to the leave reserved as above.

Knowles, in last Michaelmas Term, obtained a rule to show cause why a verdict should not be entered for defendants, "on the ground that the disclaimer describes a different invention from that described *766] in the *specification, and for which the patent was granted; also on the ground that the specification, and the specification as altered by the disclaimer, included what was not new; that, if the invention be limited to the particular mode of applying centrifugal force described and shown in the specification and drawing of the plaintiff, there is no evidence of the infringement:" or for a new trial, "on the ground that the verdict was against the weight of evidence; also on the ground of misdirection, in the learned Judge telling the jury to bear in mind, on the question of infringement, that the plaintiff carried the weight up the leg of the flyer, and above the plane of the presser, and used two bearings, and that the plaintiff's invention decreased the space occupied by the flyer, without also calling attention to the fact that such two bearings, and a weight at the top of the figure, were known before the date of the plaintiff's patent; and also on the ground of misdirection of the learned Judge, in reference to the specification, in not telling the jury that it claimed too much, and did not distinguish what was old from what was new in the said invention."

In this Term, (a)

Hugh Hill, Montague Smith, and Hindmarch showed cause.—Taking the claim and the disclaimer together, the plaintiff has claimed only for that particular application of the law of centrifugal force which takes place by means of a weight acting upon a presser so as to cause it to press against a bobbin as described in the specification. The original claim, no doubt, was much larger: but it comprehended that which is described in the disclaimer. There is therefore no inconsistency.

*767] **[CROMPTON, J.—May not the first claim be for a principle, the second for a particular machinery to carry out the principle?]*

In each case the claim is for the application of the principle: and one mode of applying it is described by way of illustration: but, by the disclaimer, the claim is limited to that single mode. Then the fact of infringement was for the jury: but the evidence showed an infringement. [The argument on the weight of evidence is omitted.]

1. *Knowles, Grove, and Webster*, contra.—The disclaimer and the claim are at variance. The disclaimer limits the claim to a particular mode of application described in the specification; but that mode is not claimed directly in the original claim; it appears merely as an illustration of the original claim, not as itself a part of the invention. If the disclaimer does not so limit the claim, the specification is bad as being too large: *Holmes v. The London and North Western Railway Company*, 12 Com. B. 831 (E. C. L. R. vol. 74). [They then argued as to the weight of evidence. *Smith v. London and North Western Railway Company*, 2 E. & B. 69 (E. C. L. R. vol. 75), was cited.] *Cur. adv. vult.*

(a) January 12th. Before Lord Campbell, C. J., Wightman and Crompton, J. Coleridge, J., was present during a part of the argument.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

We are of opinion that, upon the question of law reserved, whether the disclaimer describes a different invention from that described in the specification, the plaintiff is entitled to our judgment. It is quite clear that, if, the specification and the disclaimer being taken together, anything is claimed which was not comprised in the original specification, the whole is bad; and on *the issue that the plaintiff has not duly specified his invention the verdict ought to be entered for the [768 defendants.

But we are of opinion that nothing new is claimed by the disclaimer, and that, due effect being given to the disclaimer, the plaintiff only claims a particular application of centrifugal force as described by the diagram and explained in the specification. The defendants' counsel truly observed that the decision of this question depends upon what the plaintiff refers to in the disclaimer "as described in the said specification." If this reference be to the general description of the plaintiff's "improvements in machinery or apparatus for preparing, slubbing, and roving cotton and other fibrous substances," without reference to the diagram, the plaintiff may be considered as claiming the invention of the *principle*, or the universal application of the principle, of centrifugal force to the flyers employed in machinery for the purpose of producing the required elasticity or pressure on the bobbin. But we are of opinion that the reference in the disclaimer is to the particular application of the centrifugal force as described in the diagram, and explained by the text of the specification. After a very minute and accurate explanation of the diagram (from which it was proved that any workman of ordinary skill could easily have constructed the apparatus), the plaintiff proceeds to say: "The above apparatus represents one particular and practicable mode of applying my invention; but I would here remark that I do not intend to confine myself to this particular method; but I claim as my invention the application of the law or principle of centrifugal force," &c., "for the purpose of producing a hard and evenly compressed bobbin." Surely, when he says he does not mean to confine himself to this *par- [769 ticular method, he claims this particular method, while he proceeds to claim something more. If he does claim this particular method, it is comprised in the claim made by the specification; and by the disclaimer he disclaims everything claimed by the specification except this particular method. The effect is the same as if this particular method alone had been described and claimed by the specification.

To suppose that the exception mentioned in the disclaimer refers to the general description of the invention, and not to the apparatus portrayed in the diagram, seems to us a violation of the language the plaintiff employs, and a perversion of his meaning. Indeed, if he is not to be understood as disclaiming all except the particular method illustrated by the diagram, there seems great difficulty in saying what he disclaims; and the disclaimer would be a nullity.

We are therefore of opinion that the disclaimer excepts only the particular method of the application of the centrifugal force, and that this was claimed by the original specification, so that the plaintiff must now be considered as having sufficiently specified his invention.

If this be so, the alleged misdirection of the Judge in reference to the specification, in not telling the jury that A. claimed too much, cannot be

supported. The other alleged misdirections alleged in the rule ought not to have been introduced into it; for they are mere observations on the weight of the evidence; and no objection has been made to the direction in point of law with which the issues upon the novelty of the invention and the infringement were left to the jury.

We have, therefore, only further to consider whether the verdict for *770] the plaintiff on these issues, or either of *them, ought to be set aside as against the weight of evidence. We are all quite clear that on both issues the plaintiff adduced evidence which the Judge was bound to submit to the jury. Scientific witnesses swore, and assigned their reasons for swearing, that the plaintiff's method of using the centrifugal force was substantially different from Dyer's, and was new at the time when the patent was granted; and that the defendants' method is substantially the same as the plaintiff's. The defendants adduced conflicting evidence on both issues: and, if the jury had given credit to that evidence, we could not have said that their verdict was wrong. As little can we say that the verdict they have found for the plaintiff is wrong. This appears to be a case peculiarly for the decision of a jury, the two issues depending so much upon the degree to which the plaintiff's method resembled Dyer's and the defendants' method resembled the plaintiff's.

It is satisfactory to think that the plaintiff was the first to make centrifugal force practically useful in this process, the prior attempts to do so having been abandoned; that his method has been generally introduced, and is found to be a great boon to an important branch of our national industry; and that the defendants' method, which was not pretended to be any improvement on the plaintiff's, was not shown to have been practised by the defendants till after the plaintiff's method had been generally adopted.

Upon the whole, we are of opinion that the verdict obtained by the plaintiff ought not to be disturbed, and that this rule must be discharged.

Rule discharged.

*771] *IN THE EXCHEQUER CHAMBER.

HIGGINS and Others v. SEED. [June 16, 1858].

[For syllabus, see *antè*, p. 755.]

THE defendants appealed to the Exchequer Chamber against the above decision, by order of the Queen's Bench, of 22d January, 1858, "that the defendants have leave to appeal, in addition to the ground reserved at the trial of this cause, on the construction of the specification and disclaimer of the plaintiff; also on the ground that, taking the specification and disclaimer to be good for the reasons mentioned in the judgment of this Court, there was no evidence to go to the jury of infringement."

The case was argued in Trinity Vacation, 1858.(a)

Knowles, for the appellants (defendants below).—The specification was clearly too extensive: the respondent claimed all applications of centrifugal force to the purpose of producing the result. But subse-

(a) June 15th and 16th.

quently he disclaims all application, except by the particular mode which had in the specification been described as one instance of the application of centrifugal force, by way of illustration. This the Court of Queen's Bench construe to be a claim limited to the particular process so described. But a claim, so limited, is a claim of something different from that claimed in the specification. The specification *did not claim the particular machinery, but all applications of cen- [772 trifugal force; that is a claim of a principle. The disclaimer claims the particular machine, and that only. Now the office of a disclaimer, under stat. 5 & 6 W. 4, c. 83, is not to introduce something not previously claimed, but only to narrow the previous claim.

But, further, if the judgment of the Court of Queen's Bench was correct on this legal point, it still must be reversed on a point not expressly decided by them. The infringement proved was not a use of the machine to which, upon this supposition, the respondent's claim is limited, but of a machine acting indeed by centrifugal force, and therefore infringing upon the patent as originally specified, but not acting by a weight wholly at the top of the leg acting on a presser so as to cause it to press against the bobbin, which is the mode of action of the respondent's machine. The witness Carpmael seems to have devised for the respondent a patent of which he himself never thought. [He then discussed the evidence.]

Hindmarch, contra.—In order to support the argument on the other side, it must be taken that the disclaimer disclaims the whole of the original specification. The specification expressly refers to the drawings, which are given "in order more clearly to illustrate my invention, and the method of carrying the same into practical effect." [WATSON, B.—Might it not be said that he declares "I claim the application of the principle to this mode, and I claim all other modes?"] He claims in the first instance, among other things, the particular application to which afterwards, in his disclaimer, he confines himself.

*As to the evidence of infringement, there was evidence to go to the jury. There was no dispute about what the defendant had [773 done: Dyer's patent has nothing to do with the question of infringement of the plaintiff's patent, which, for this part of the argument, must be assumed to be valid. [BRAMWELL, B.—Does it not come to this? The patent, for this part of the argument, is to be assumed good as not claiming what was in Dyer's patent. But then what is left? And is there an infringement of that?] The bona fides or mala fides is unimportant. The evidence shows that the defendants have adopted an improvement upon Dyer's machine which is borrowed from the machine of the plaintiff. [The discussion of the evidence is omitted.]

Grove (in the absence of *Knowles*) was heard in reply.

WILLIAMS, J.—I am of opinion that the judgment of the Court of Queen's Bench must be reversed; not on any ground considered in that Court, but on the additional ground that there was no evidence, to go to the jury, of any infringement of the patent. We need not, therefore, consider whether the Court below was right in its construction of the effect of the disclaimer and specification. I do not mean to suggest that this view was incorrect: but it was right only on the ground that, by a fortunate accident, the plaintiff has succeeded; his intention having been to take out a patent for a principle, comprehending every possible

mode of applying it. Having that intention, in order to comply with the terms on which the patent was granted, of specifying and describing how the work was to be performed, he attaches to his specification drawings showing one way *of applying the principle to a roving-machine having a flyer. And he adds: "I would here remark that I do not intend to confine myself to this particular method; but I claim as my invention the application of the law or principle of centrifugal force to the particular or special purpose above set forth; that is, to flyers used in machinery or apparatus for preparing, slubbing, and roving cotton and other fibrous materials, for the purpose of producing a hard and evenly compressed bobbin." That is, he sets out one mode of application, yet wishes to state that his patent consists in applying the principle in any way. Then, seeing that this claim is not good, either as comprehending something not new, or as not explaining sufficiently so general a claim, he enters a disclaimer. Now he is entitled to withdraw so much of his original claim as would leave only an application of the particular method. It comes therefore to this, that he claims simply what was in his drawing. But that is a thing quite different from what the witnesses were stating, or what the plaintiff's counsel were thinking of. If the patent had been for elevating the weight from below and thereby getting rid of the inconvenience of other applications of centrifugal force, there might have been force in the way in which the case was put. But, what we have to see is, looking at the invention as narrowed by the disclaimer, is there anything to go to the jury to show an infringement? An infringement of what? The witnesses show only the user by the appellants of something different from the machine represented by the drawing. [His Lordship then discussed the evidence.] The weight, in the machine of the respondent, is carried wholly up to the top: that in the machine of the appellants is partly distributed along *the vertical rod. The two may produce the same result; but they do not produce it by the same machinery.

MARTIN, B.—I also am of opinion that the judgment of the Court of Queen's Bench must be reversed. No one can read the original specification without seeing that the patentee meant to claim the application of centrifugal force generally, and that he only followed up this claim by showing one particular method of carrying the principle into effect by flyers. Then, under stat. 5 & 6 W. 4, c. 83, he disclaims, and in express terms limits himself to that particular method. I give no opinion as to whether it was competent to him to disclaim in this way. I myself have the greatest doubt as to that: it strikes me that the words in the patent merely claim the principle, and describe the machine only for the purpose of showing, as was necessary, a mode of applying the principle. But, supposing the effect of the original specification and disclaimer to be that the claim ultimately is for the machine described in the drawing, then the evidence fails to show that the appellants have done more than use another machine capable of producing the same benefit upon the same principle but by other means. I agree with the view taken by the Lord Chief Baron of the Exchequer in *Unwin v. Heath*,^(a) that a fraudulent imitation or evasion might constitute an infringement: but I can see no evidence of a fraudulent intention here: there is no evidence that

(a) In Dom. Proc., 16 Com. B. 713, 762 (E. C. L. R. vol. 81), S. C. 5 H. L. Ca. 505, 541, reversing the judgment of the Court of Exchequer Chamber in *Heath v. Unwin*, 12 Com. B. 522 (E. C. L. R. vol. 74).

the appellants had ever heard of the respondent's invention. I think therefore that there was no evidence for the jury of an infringement.

*WILLES, J.—I am of the same opinion. I will not enter into the question whether there can be an infringement without an [*776 intention to infringe: I should rather have thought that there might. Here the patent was originally taken out generally for an application of centrifugal force to the proposed object. The respondent thought that this was his own discovery, and did not know of Dyer's patent. Then he discovered that Dyer had previously applied centrifugal force, and therefore that his own patent could not be sustained. Accordingly, he lodged a disclaimer, abandoning his original claim except so far as he had described in his drawing a machine by which the application of centrifugal force could be effected. Now, assuming that such a disclaimer is valid, the claim is reduced to that. But what have the appellants done? They connect the weight with the flyer; and in this respect they follow Dyer's patent. But then they also carry a part of the weight to the top, and in this respect improve upon or alter Dyer's machine. But the evidence shows that the weight is not placed where it would be placed if the invention of the respondent, as limited by the disclaimer, had been adhered to. [His Lordship then discussed the evidence as to the peculiarities of the different machines, and pointed out that the respondent made no claim to the double bearings.] The result is that the respondent and appellants, in the application of their weight, get it out of the way of the other machinery by different methods. The evidence therefore shows no infringement of that which the respondent ultimately claims.

BRAMWELL, B.—I am of the same opinion. The question is one partly of law and partly of fact. In order to see whether there has been an infringement, *we are to examine what it is that is said to be [*777 infringed upon and what the alleged infringement is. In order to see what it is that is said to be infringed upon, we are to look at the specification and disclaimer. I think, under these, the respondent can claim only for the particular machine described in his drawing. But then, if the appellants, intentionally or not, had used what was equivalent to that machine, there would have been an infringement. My learned Brothers, however, have clearly shown the difference between the machines; and, without again going through the evidence, I will merely state that I agree with them. Of course we do not call upon the witnesses to say directly that there is or is not an infringement: they can only tell us what the machines in question are and how they act: and I take their evidence here to be true in all particulars. But then I agree that the effect of it is that the machines are not the same.

WATSON, B.—I am entirely of the same opinion. I will not pronounce any opinion as to whether there is a good claim under the specification and disclaimer; but I look simply to the principle upon which, if at all, the claim is good; and then I am to inquire whether the claim, explained upon that principle, is for anything which has been infringed upon. Now the claim is good upon the principle only that it is for the machine as described in the drawing: and it appears to me that, upon the evidence, there has been no infringement of that machine.

BYLES, J.—The claim, as narrowed, is for the application of centrifugal

*778] force in a particular way: but, upon *the evidence, the appellants have not applied centrifugal force in that way.

WILLIAMS, J., added that the majority of the Court were of opinion that the decision of the Court of Queen's Bench on the point of law was correct.

Some discussion afterwards arose upon the proper judgment to be given by this Court: and ultimately the Court directed a new trial.

JOHN JACKSON, Administrator, &c., of OLIVE JACKSON, deceased, v. RALPH WOOLLEY and HANNAH his Wife. Jan. 19.

A., in an action brought against B. after the passing of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), in order to bar the operation of the Statute of Limitations (21 Ja. 1, c. 16, s. 3), proved payments of principal and interest, within six years before suit, and before the passing of The Mercantile Law Amendment Act, 1856, by a co-contractor with B.; and it was stated, in a special case, that such payments were made with the knowledge and consent of B.

Held by the Court of Q. B.: that by virtue of sect. 14 of The Mercantile Law Amendment Act, 1856, assuming it to be applicable to a transaction before the Act, such proof did not bar the operation of stat. 21 Ja. 1, c. 16, s. 3; for such a finding as to the knowledge and consent of B. did not show that the defendant was charged otherwise than by *reason only of payment of any principal or interest by any co-contractor or co-debtor*. And that sect. 14 is so applicable. Judgment for defendant.

And, per Crompton, J., proof of express verbal consent by a defendant to a payment by a co-contractor would not take the case out of the 14th section.

Judgment reversed in Exch. Ch., on the ground that sect. 14 of The Mercantile Law Amendment Act, 1856, does not apply to the case of a payment made before the Act.

THIS was a special case stated by consent, without pleadings, to the following effect.

The writ in the action was issued on the 23d of June, 1857. The action is brought to recover the sum of 86*l.* 4*s.*, namely, 80*l.* balance of principal, and 6*l.* 4*s.* interest thereon to the 16th November, 1857, on a promissory note. The promissory note is as follows: "For value *779] received we jointly and severally promise to pay to Mrs. Olive Lowndes, or her order, upon demand, the sum of 100*l.* together with interest for the same after the rate of 4*l.* 10*s.* per centum per annum. As witness our hands this 28th day of February, 1845."

"JOHN RUSHTON."

"Witness

"HANNAH RUSHTON."

"JNO. MICH. BLAGG."

The said note was given and signed by the said John Rushton and Hannah Rushton as a security for money lent by the said Olive Lowndes to the said John Rushton. After the making of the said note the said Olive Lowndes married one John Jackson, who afterwards died; and the said Hannah Rushton, who is the female defendant, married the said Ralph Woolley. The said John Rushton paid the interest on the said note regularly up to the 28th February, 1856, first to the said Olive Lowndes, and afterwards to the said John Jackson; and several of such payments were made by him within six years from the commencement of this suit, and before the passing of The Mercantile Law Amendment Act, 1856. The said John Rushton also within six years from the commencement of this suit, and before the passing of The Mercantile Law Amendment Act, 1856, duly paid, on account of the principal due

on the said note, two several sums of money, namely, 10*l.* in 1852, and a like sum of 10*l.* in 1854. No payment on account of either principal or interest was ever made, or written acknowledgment or promise made or given, by the said Ralph Woolley, or by his said wife, either before or after her marriage; but several of the said payments, so made by the said John Rushton within six years from the commencement of this suit, and before the passing of The Mercantile Law Amendment Act, 1856, were made *with the knowledge and consent of the defendant, Hannah Rushton, and before her marriage. The said note never [*780 was reduced into possession by the said John Jackson, deceased. The question for the opinion of the Court is, whether the defendants are, under the circumstances, exempt from liability in respect of the said note. If the Court should be of opinion in the affirmative, judgment is to be entered for the defendants, with costs of suit; if in the negative, judgment to be entered for the plaintiff for 86*l.* 4*s.*, with costs of suit.

Prideaux, for the plaintiff.—The material facts to be considered are, that a cause of action had accrued upon a joint and several promissory note against the defendant Hannah Woolley more than six years before the commencement of the suit; but that within such six years there had been a payment of part principal and of interest by her co-contractor; and that such payments, which were made before the passing of The Mercantile Law Amendment Act, 1856, were made with her knowledge and consent. The question is, whether the action was barred by lapse of time as against her. Independently of The Mercantile Law Amendment Act, 1856, the payments by her co-contractor, though they had been made without her consent or knowledge, would have taken the case out of the Statute of Limitations (21 Ja. 1, c. 16, s. 3), and the defendants would be liable. The question therefore is whether, by sect. 14 of The Mercantile Law Amendment Act, 1856, this case is restored, notwithstanding the payments by the co-contractor, to the benefit of the enactment in favour of the defendants contained in stat. 21 Ja. 1, c. 16, s. 3. That depends upon two questions: first, whether the [*781 *payments in this case are such payments as are within the meaning of sect. 14, (a) supposing it applicable to any payments made before the Act received the Royal Assent; and secondly, whether the section is retrospective. Now, as to the first question, the section refers to the cases where a co-contractor is to be charged by reason *only* of payment by any co-contractor, &c. The meaning is that the enactment is to be applied only where the evidence by which a defendant is sought to be charged is of the mere fact of payment of principal or interest by a co-contractor; but here is another fact in evidence, which is that such payment by the co-contractor was made with the consent of the defend-

(a) Stat. 19 & 20 Vict. c. 97, s. 14, is in the terms following: "In reference to the provisions of the Acts of the twenty-first year of the reign of King James the First, chapter sixteen, section three, and of the Act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section three, and of the Act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors, or administrators."

ant, Hannah Woolley. That takes the case out of the section, and makes the payment by John Rushton a payment on behalf of Hannah Woolley, which is sufficient to take the case out of stat. 21 Ja. 1, c. 16, s. 3. As to the second point, the Court will not so construe the section as to make it retrospective, and thus take from the plaintiff a right of action which was vested in him at the passing of the Act. The rule of construction applicable has been thus enunciated by Rolfe, B., in *Moon v. Durden*, *782] 2 Exch. 22, 33:† “The general rule on *this subject is stated by Lord Coke, in the Second Institute, 292, in his commentary on the Statute of Gloucester, ‘Nova constitutio futuris formam imponere debet, non præteritis;’ and the principle is one of such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the Legislature meant it to operate retrospectively.” There is nothing on the face of the section in question to show beyond doubt that the Legislature meant it to operate retrospectively; it must therefore be construed to be prospective; and then it is inapplicable to the present case. [CROMPTON, J.—The case of *Williams v. Smith*, 2 H. & N. 443,† determines that sect. 1 of this statute is prospective only: but has not sect. 14 been determined to be retrospective by *Kindersley, V. C.*, in *Thompson v. Waithman*, 3 Drewr. 628?(a)] That case was decided upon an erroneous assumption that at the time of the passing of this statute the law was doubtful as to the effect of payment by a co-contractor. But in *Atkins v. Tredgold*, 2 B. & C. 23 (E. C. L. R. vol. 9), it was admitted that the law was then settled. [Lord CAMPBELL, C. J.—The ratio decidendi of the Vice-Chancellor was that the section in question is retrospective.]

Tomlinson, contra, was not called on.

Lord CAMPBELL, C. J.—It has been determined by a Court of co-ordinate jurisdiction that sect. 14 of The Mercantile Law Amendment Act, 1856, is retrospective. *We are bound by that decision. *783] We express no opinion of our own as to what may be the true construction of the section; that matter, so far as this Court is concerned, is *res integra*. If the plaintiff would question the interpretation of the Vice-Chancellor, he must take this case to a Court of error. Assuming then the section to be retrospective, I am of opinion that the facts of this case bring it within the operation of the enactment. The finding in this case as to the knowledge and consent of Hannah Rushton seems to me to amount only to a finding that she knew that John Rushton was paying, on his own behalf, the money which he was bound to pay, and that she assented in her own mind to the propriety of his so doing. It does not amount to a finding that he was paying money on her account by her authority. Such knowledge and consent on her part as is found in this case could have no effect upon the transaction, and can have none upon the application of the law to it.

COLERIDGE and WIGHTMAN, Js., concurred.

CROMPTON, J.—I agree that in this case the finding does not amount to more than an unexpressed assent, existing in the mind of Hannah Rushton, to the propriety of the payments made by John Rushton. But, if it were more, and amounted to an express consent, I am of opinion that the late statute would apply. The real meaning of sect. 14 is that,

(a) See *Cornill v. Hudson*, ante, p. 429.

where the plaintiff, in order to take his case against the defendant out of the Statute of Limitations (21 Ja. 1, c. 16, s. 3), proves only one act done, and that a payment of principal or interest by a co-contractor, such proof shall not avail. *The effect of such proof would not, in my judgment, be increased by proof of any verbal consent [*784 by the defendant to such payment by the co-contractor.

Judgment for the defendants.(a)

(a) Reported by W. B. Brett, Esq.

IN THE EXCHEQUER CHAMBER.

JOHN JACKSON, Administrator, &c., of OLIVE JACKSON, deceased, Appellant, v. RALPH WOOLLEY and HANNAH his wife, Respondents. [June 14.]

[For syllabus, see *antè*, p. 778.]

THE plaintiff below appealed from the preceding judgment of the Court of Queen's Bench.

The case was argued in Trinity Vacation, 1858.(a)

Prideaux, for the appellant (plaintiff below).—But for The Mercantile Law Amendment Act, 1856, the plaintiff would clearly have been entitled to recover upon proof of the payments made by the co-contractor of the defendant Hannah. The question therefore is, whether, by virtue of sect. 14 of that Act, the plaintiff is in this action disentitled. He is not: the case is not within the statute; and that for two reasons. First, because the proof was of more than *only* a payment or payments of principal or interest by a co-contractor. There was, *besides [*785 the fact of such payments, the further fact that they were made with the knowledge and consent of the defendant. The proof against which the enactment in sect. 14 is aimed is proof of such payments as were proved in *Goddard v. Ingram*, 3 Q. B. 839 (E. C. L. R. vol. 43), which were made by a co-contractor in fraud of the defendants, and yet were held to bar the operation of the Statute of Limitations in favour of the defendants. Secondly, the case is not within the statute, because sect. 14 is not retrospective. The Court below held that it was, in deference only to the judgment in *Thompson v. Waithman*, 3 Drewr. 628. But that decision is contrary to the decision in *Williams v. Smith*, 2 H. & N. 443,† and to the rule of construction enunciated by Rolfe, B., in *Moon v. Durden*, 2 Exch. 22, 33.† (He was then stopped by the Court.)

Tomlinson, *contrà*.—Although, where a statute enacts a new law, the Courts will not, unless obliged by the explicitness of its terms, construe it so as to give it effect on past transactions, yet that rule of construction is not applicable where a statute is declaratory; i. e. where the law upon a particular matter has been considered doubtful, and a statute is passed to declare what it is and has been. And The Mercantile Law Amendment Act, 1856, is a statute in the second of these classes. The

(a) June 14th, 1858.

law as to the effect of payments by other persons than the party sued, to take cases out of the Statutes of Limitations, was doubtful according to the decisions. Thus, in the note (a) to *Whitcomb v. Whiting*, 2 Doug. *786] 652, it is stated to *be a moot point whether a payment by one executor would bind another. In *Winter v. Innes*, 4 Myl. & C. 101, a doubt is raised as to the effect of these payments in equity. And though, in the principal case of *Whitcomb v. Whiting*, the case as to payment by a co-contractor is distinctly determined, yet the propriety of that decision is questioned in *Brandram v. Wharton*, 1 B. & Ald. 463, and in *Atkins v. Tredgold*, 2 B. & C. 23 (E. C. L. R. vol. 9). Sect 14 was intended to set at rest these doubts, and to declare what the law under the Statute of Limitations (21 Ja. 1, c. 16), sect. 3, always was and is. Sect. 14 therefore is applicable to past as well as to future payments. It can hardly be supposed that the Legislature would pass a law to settle these doubts, and yet leave them open in all actions to be brought during six years. This argument prevailed in *Towler v. Chatterton*, 6 Bing. 258, which determined the construction of stat. 9 G. 4, c. 14, s. 1, and should therefore prevail in this case, the statute in question being passed in *pari materia* for a similar purpose. It may be further argued that sect. 14 is retrospective, upon a consideration of the various parts of the statute itself. In all the preceding sections the dates of the application of the statute are specifically named, and are future: but in sect. 14 that form is abandoned and the terms are general, so as to be applicable to all payments, past and future. This is the view taken of the enactment by *Kindersley, V. C.*, in *Thompson v. Waithman*, 3 Drewr. 628: and that case, and the reasoning on which it is founded, were in terms approved of by *Erle, J.*, in *Cornill v. Hudson*, ante, p. 429.

*787] *WILLIAMS, J.—I am of opinion that the judgment of the Court below must be reversed. No one has more respect than I have for the opinion of Vice-Chancellor *Kindersley*. I have read his judgment in the case of *Thompson v. Waithman*, 3 Drewr. 628, with great care, but cannot coincide with him in his interpretation of the statute. He seems to have decided that, although all the other sections were from their language necessarily prospective, yet sect. 14 is retrospective because there is nothing future in the language of that section as to payments by co-contractors. But, in coming to such a conclusion, he does not seem to have regarded Lord Coke's well known canon: "*Nova constitutio futuris formam imponere debet, non præteritis.*" That is the ordinary rule as to the interpretation of all legislative enactments, and is to be observed unless there be something in the terms of a particular enactment to prevent its operation. I see nothing in the language of the section under discussion to prevent its application. How then should the section be applied to the facts of this case? Before the passing of the statute this plaintiff, by reason of a payment by one of the defendant's co-contractors, which payment was by the law considered to be made by him as an agent of the other co-contractor, had acquired a vested right of action against that defendant. It would require words of no ordinary strength in the statute to induce us to say that it takes away such a vested right. I see nothing in the section to give it that effect. I am of opinion that sect. 14 is wholly prospective.

***MARTIN, B.**—According to the decisions of the cases arising under stat. 21 Ja. 1, c. 16, s. 3, the plaintiff in this case had, at [*788 the time of the passing of The Mercantile Law Amendment Act, 1856, a clear vested right of action against the defendants. The question is, whether we are so to construe sect. 14 of the latter Act as, by virtue of it, to take away that vested right from the plaintiff. The rule of construction of enactments is well laid down by Rolfe, B., in *Moon v. Durden*, 2 Exch. 33.† Applying that rule, in which I entirely concur, to the section now in question, I can see nothing on the face of the enactment which puts it beyond doubt that the Legislature meant it to be retrospective, so as to deprive any person of a right of action vested in him at the time of the passing of the Act. I am therefore clearly of opinion that the section was not applicable in the present case.

WILLES, J., BRAMWELL, B., WATSON, B., and BYLES, J., concurred.
Judgment reversed.

***JOSEPH HENRY DICKINSON, Appellant, v. WILLIAM KITCHEN, Respondent, in the matter of an Interpleader** [*789
Summons in the case of the said **WILLIAM KITCHEN v. JOHN RITSON IRVING.**

The claimant, upon an interpleader summons in the county court as to his alleged title to a ship seized in execution upon a judgment against the registered owner, proved a previous mortgage of the ship to him by such owner for a loan, with a proviso in the mortgage postponing until a date subsequent to the seizure of the ship the power of sale vested in the mortgagee by sect. 71 of The Merchant Shipping Act, 1854 (stat. 17 & 18 Vict. c. 104), and that such mortgage was recorded in the register book of the port of the ship's registration in the form prescribed by sect. 66 of the same statute; but it also appeared that there was no endorsement made on the certificate of registry according to the requirements of stat. 4 G. 4, c. 41, ss. 35, 43, and of stat. 3 & 4 W. 4; c. 55, ss. 34, 42.

Held, upon appeal to the Court of Q. B., that the mortgage was not invalid either as a fraud against creditors, or as not being according to The Merchant Shipping Act, 1854, on the ground of the postponement of the power of sale.

Held, further, that, even if the registration of the mortgage was imperfect by reason of the want of the endorsement on the certificate, yet a judgment given by the county court upon the interpleader against the claimant in favour of the execution-creditor was erroneous; for the claimant became and was the owner of the ship by reason of the mortgage, and such common law incident to a mortgage is not abrogated by sect. 70 of The Merchant Shipping Act, 1854, which was intended to protect a mortgagee, taking possession of a mortgaged ship in order to make it available as a security, from liabilities that might otherwise attach upon him as owner of a ship in possession.

Seemle, per Lord Campbell, C. J., that the registration in the case was perfect without any endorsement on the certificate.

This was a case stated on appeal from the County Court of Cheshire, holden at Birkenhead.

The statement of the case, so far as material to the present decision, was as follows. On the 6th of October, 1857, the plaintiff Kitchen obtained a verdict in an action against the defendant Irving in the county court of Cheshire, holden at Birkenhead, for the sum of 43*l.* 4*s.* 2*d.*, for work done by him as a shipwright on the ship *Thames*, and other vessels of the defendant; and, on the 9th of October, 1857, the *Thames*, which was then lying in the *Birkenhead Docks, was [*790 seized in execution by the officers of the court for the sum of 48*l.* 5*s.* 10*d.*, being the amount of the said verdict and costs. But the vessel,

with all her tackle, &c., was claimed by Joseph Henry Dickinson. Interpleader summonses issued to try the question of ownership; and the case came on for hearing on the 27th of October. At the hearing, the claimant relied upon a mortgage of the ship to him by the defendant Irving, bearing date the 14th of July, 1857. It was further proved that the defendant Irving was, at the time of the seizure, the sole registered owner of the ship *Thames*, as appeared by a certificate sealed with the seal of the Custom House at Liverpool, bearing date the 19th of October, 1857. Other documents, which were produced at the hearing, were proved to be transcripts of the entries relating to the said ship as they appear in the Register Book kept at the Custom House at Liverpool. There was no alteration in the management of the vessel, either at the time of the mortgage or afterwards, to indicate a change of ownership or possession: but the defendant Irving continued, as before, to give directions with reference to the ship, and was so employed on board at the time of the seizure.

The mortgage above referred to in the case was a mortgage of the ship, &c., for a loan of 2300*l.*, and was in the usual form, with the exception of a proviso contained in it that the power of sale vested in Dickinson, the mortgagee, by virtue of The Merchant Shipping Act, *791] 1854 (17 & 18 Vict. c. 104), sect. 71,(a) should *not be exercised until the 14th of October, 1857. The entries above referred to in the Register Book were the original entry, in the usual form, of the defendant Irving as owner of the ship *Thames*, and an entry, dated the 20th of July, 1857, which was in strict compliance with sect. 66,(b) of the Merchant Shipping Act, 1854, of the particulars of the mortgage of the ship to Dickinson. There was no endorsement on the certificate of registry mentioned in the case.

The case ended by stating that the Judge held that the plaintiff Kitchen was justified in seizing the ship for Irving's debt, and gave judgment accordingly. The question left was: But if the Court shall be of opinion that, under the circumstances, the appellant's claim ought to have prevailed, the Court will make an order accordingly.

Archibald, for the appellant.—The execution-creditor of Irving, the registered owner of the ship, had no legal right to seize the ship in this case as against the appellant, the mortgagee. By sect. 66 of The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), a ship may be mortgaged; and consequently, when a ship is mortgaged and such mortgage is registered, the usual incidents to a mortgage attach; one of which is that the legal estate or property in the thing mortgaged passes to the mortgagee. This mortgage was properly registered, *792] *according to the directions of sects. 66 and 67,(c) and therefore had full force. As against this view it will be urged that, in the

(a) By which it is enacted: that "every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money," &c.

(b) By which it is enacted: that "a registered ship or any share therein may be made a security for a loan or other valuable consideration; and the instrument creating such security, hereinafter termed a 'mortgage,' shall be in the form marked (I.) in the schedule hereto, or as near thereto as circumstances permit; and on the production of such instrument the registrar of the port at which the ship is registered shall record the same in the register book."

(c) Which enacts: that "every such mortgage shall be recorded by the registrar in order of time in which the same is produced to him for that purpose; and the registrar shall, by memorandum under his hand, notify on the instrument of mortgage that the same has been recorded by him, stating the date and hour of such record."

earlier part of sect. 70, it is declared that "a mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship." And, if the section had ended there, the argument might have been successfully maintained that Irving was at the time of the seizure still the owner of the ship, and that therefore the execution-creditor had a right to seize the ship, the property of the execution-debtor. But such a view of the law would give no effect to the latter part of the section, which is in these words: "except in so far as may be necessary for making such ship or share available as a security for the mortgage-debt." If another creditor of the mortgagor can seize and sell a mortgaged ship, it is not available to the mortgagee as a security for the mortgage-debt. The ship, if such a power can be exercised over it by a third person, is no security at all. This review of the section shows that the interpretation sought to be put upon the earlier part of it is erroneous. The true meaning of the section is, that the ship, by the latter part of the section, is left as a complete security in the hands of the mortgagee, notwithstanding the earlier part, which is enacted for the purpose of protecting the mortgagee from liabilities which might, but for it, attach upon him as the legal *owner of the vessel. Thus, in *Dean v. M'Ghie*, 4 Bing. 45 (E. C. L. R. [793 vol. 13], one Prince mortgaged his ship, then on her homeward voyage, to one Chance, who, before the end of the voyage, took possession of the ship, and at the end demanded from the defendants the accruing freights, which the defendants had received as brokers of Prince. The plaintiffs, the assignees of Prince, sued the defendants, who, being indemnified by Chance, had refused to pay over the freight to the plaintiffs, for not properly accounting for the freights, and relied upon stat. 6 Geo. 4, c. 110, s. 45, (a) to show that Chance was not, by the mortgage or by taking possession of the ship, to be considered as owner or entitled to the accruing freight, but that Prince was still the owner, and therefore the plaintiffs were entitled to an account. The plaintiffs, however, were nonsuited, and the nonsuit held to be right, on the ground that Chance, by the mortgage, had become the *legal owner of the ship and entitled to the accruing freight, and that such right was not diminished [794 by the enactment relied on. "The statute 6 G. 4, c. 110," says Gaselee, J., "was passed for the benefit of the mortgagee, and not to deprive him of any means of indemnity against loss." "The object of that

(a) By which it is enacted, "that when any transfer of any ship or vessel, or of any share or shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage, or of assignment to a trustee or trustees for the purpose of selling the same for the payment of any debt or debts, then and in every such case the collector and comptroller of the port where the ship or vessel is registered shall in the entry in the book of registry, and also in the endorsement on the certificate of registry, in manner hereinbefore directed, state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect; and the person or persons to whom such transfer shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not by reason thereof be deemed to be the owner or owners of such ship or vessel, share or shares thereof; nor shall the person or persons making such transfer be deemed by reason thereof to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred, available by sale or otherwise for the payment of the debt or debts for securing the payment of which such transfer shall have been made."

statute," says Best, C. J., "was to confer a benefit on mortgagees, by exempting them from charges and responsibilities to which they were before liable:" 4 Bing. 49 (E. C. L. R. vol. 13). The same point was determined in *Kerswill v. Bishop*, 2 C. & J. 529,† on the same statute.

Littler, for the respondent.—No right at all passes in the ship to a mortgagee thereof, unless the mortgage is properly registered; and in this case the mortgage was not properly registered. The Merchant Shipping Act, 1854, does not contain all the requisites of a perfect registration. By stat. 17 & 18 Vict. c. 120, many Acts as to merchant shipping are repealed; but stat. 4 G. 4, c. 41, is not; nor is stat. 3 & 4 W. 4, c. 55. They are therefore binding, when not inconsistent with stat. 17 & 18 Vict. c. 104. Now, by sects. 35 and 43 of stat. 4 G. 4, c. *795] 41,(a) and by sects. 34 and 42 of stat. 3 & 4 W. 4, *c. 55,(b) among other requisites to a perfect registration, by which alone it is expressly declared that the property in a ship passes, it is required and necessary that an endorsement of all the particulars of the mortgage should be made at the time of the registration on the certificate of registry of the ship or vessel as well as in the book of registry. No such endorsement has been made in this case: there is nothing in stat. 17 & 18 Vict. c. 104, inconsistent with the requirement that it should be made: there was therefore an imperfect and invalid registration; and *796] consequently no property in the ship *passed to the mortgagee. [CROMPTON, J.—There may be a defect in the registration of the mortgage: but is it a defect which does away with the legal consequence of the mortgage? The validity of the bill of sale or other instrument to pass the property in the ship is made, in the sections to which you

(a) Sect. 35. "And be it further enacted, that no bill of sale or other instrument in writing shall be valid and effectual to pass the property in any ship or vessel, or in any share thereof, or for any other purpose, until such bill of sale or other instrument in writing shall have been produced to the collector and comptroller of the port to which such ship or vessel belongs, and until the collector and comptroller shall have entered in the book of registry of such ship or vessel, and which they are hereby required to do upon the production of the bill of sale or other instrument for that purpose, the name, residence, and description of the vendor or mortgagor, or of each vendor or mortgagor, if more than one, the number of shares transferred, the name, residence, and description of the purchaser or mortgagee, or of each purchaser or mortgagee, if more than one, and the date of the bill of sale or other instrument, and of the production of it; and further, the said collector and comptroller shall and they are hereby required to endorse the aforesaid particulars of such bill of sale or other instrument on the certificate of registry of the said ship or vessel, when the same shall be produced to them for that purpose, in manner and to the effect following;" &c.

Sect. 43. "That when any transfer of any ship or vessel, or of any share or shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage or of assignment to a trustee or trustees, for the purpose of selling the same for the payment of any debt or debts, then and in every such case the collector and comptroller of the port where the ship or vessel is registered, shall, in the entry in the book of registry, and also in the endorsement on the certificate of registry in manner hereinbefore directed, state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage or to that effect; and the person or persons to whom such transfer shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not by reason thereof be deemed to be the owner or owners of such ship or vessel, share or shares thereof, nor shall the person or persons making such transfer be deemed, by reason thereof, to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred, available by sale or otherwise, for the payment of the debt or debts for securing the payment of which such transfer shall have been made."

(b) The sections are nearly a re-enactment, in terms, of sects. 35 and 43 of stat. 4 G. 4, c. 41.

refer, to depend upon the proper entry in the book of registry, but not upon the endorsement on the certificate of registration. That latter requirement seems to be enacted by way of direction only. If so, it is not a defect which we are called upon to notice. The only question left to the Court is whether, by the mortgage in this case, the property in the ship passed to the mortgagee.]

Secondly, though the mortgage was properly registered in this case, it would be invalid and fraudulent, as against a creditor, as a postponed mortgage: *White v. Morris*, 11 Com. B. 1015 (E. C. L. R. vol. 73). [Lord CAMPBELL, C. J.—You cannot say that whenever in a mortgage-deed the power of sale is postponed the deed is a fraud against creditors.] It was inoperative to pass the property also on this ground: that, under this deed, the claimant at the time of the seizure had no right to the possession of the ship, and could not have maintained trespass against the creditor who seized: *Wheeler v. Montefiore*, 2 Q. B. 133 (E. C. L. R. vol. 42). By sect. 66 of The Merchant Shipping Act, 1854, such an instrument is not made a mortgage, but is only called a mortgage; it has a legal effect only by virtue of the Act according to the terms used in it; and by such terms in this case the right of property in the claimant was postponed until the 14th of October, 1857. [Lord CAMPBELL, C. J.—To say that an instrument made under sect. 66 is not a mortgage is to contradict sect. 70, which says it is a mortgage. A mortgage is perfectly valid, and has all its legal incidents, though there be a postponed power of sale in it. A mortgage is valid without any power of sale at all. CROMPTON, J.—Though under this mortgage the mortgagee might not be entitled to sell the ship until the 14th of October, 1857, might he not, according to the cases, have seized the ship before and until that time, and have received the freight?] Though the instrument in this case was a mortgage under the Act, and though such mortgage was sufficiently registered according to the Act to take effect, yet it only took effect according to the Act, and then not such effect as to make the seizure by the execution-creditor wrongful as against the mortgagee. By sect. 70 the right given to the mortgagee under such an instrument is only to extend so far as may be necessary for making the ship available as a security for the mortgage-debt. If the value of the ship be greater than the amount of such debt, another creditor has a right to avail himself of the ship as to all its value over and above what is necessary to protect the mortgagee, i. e. as to all the surplus value beyond the amount of the mortgage-debt. If not, the mortgage takes a greater effect than is necessary to protect the mortgagee. If, then, the creditor has such right, he can enforce it only by seizing and selling the ship; and all rights are protected if he be bound to pay the mortgagee in the first place his debt. The mortgagee is then fully protected. [CROMPTON, J.—The ship would be no longer available to him as a security; he would be driven without his consent to trust to the execution-creditor as a trustee for him of the money, to the amount of his debt, produced by the sale.]

Lord CAMPBELL, C. J.—I do not see sufficient grounds, notwithstanding the argument, upon which to support the judgment. There was in fact a regular mortgage of the ship for a debt; and such mortgage was duly entered in the book of registry. It is true that there was no endorsement of the particulars made on the certificate of regis-

tration. If that ever was necessary to the validity of a mortgage, I do not think it is so now. The ship was mortgaged, and the mortgage registered according to the requirements of sect. 66 of The Merchant Shipping Act, 1854; and by virtue of that mortgage the property in the ship passed *prima facie* to the mortgagee. He was thereby the owner of the ship, unless his rights as to that ownership are restrained by any other part of the Act. It is said that his alleged right of ownership is inconsistent with the earlier part of sect. 70. That depends upon what is the true meaning of that enactment. To hold that any other creditor may seize and sell a mortgaged ship as against the mortgagee is inconsistent with the later part of that section. The true meaning and intention of the earlier part is to protect a mortgagee in doing acts necessary to make the ship available as a security for his debt. To make the ship so available, he may take possession of her and collect the freight; and yet, by the earlier part of the section, he is protected from liabilities, such as the debts of the ship, which might otherwise be urged against him as the legal owner in possession, receiving a beneficial interest. There is nothing in the Act to enable a creditor of the mortgagor to seize and sell a mortgaged ship: and the exercise of such a right by him is inconsistent with the right expressly retained in favour of the mortgagee.

COLERIDGE, J.—Assume that, at the time of the seizure by the execution-creditor, the registration of the *claimant's mortgage was
*799] imperfect for the reason pointed out: yet it does not follow that such defect prevents the ordinary incident of a mortgage, that thereby the mortgagee becomes the owner of the ship. By sect. 70 it is implied that a mortgagee, *by reason of his mortgage*, shall be deemed the owner of the ship, so far as may be necessary for making such ship available as a security for his mortgage-debt. That enactment says nothing about the registration of the mortgage. It is quite consistent with that section that the mortgagee may be owner by reason of the mortgage though the mortgage be not registered. By sect. 66, the mortgage is required to be registered in the register-book; and, by sect. 71, it is a registered mortgagee only who is empowered to sell the ship. It may be that this power of sale under the Act could not be exercised by a mortgagee until his mortgage was perfectly registered as suggested. Here, by the very terms of the instrument of mortgage, the mortgagee had no power of sale at the time when the creditor of the mortgagor seized the ship. But a power of sale is not essential to the validity of a mortgage. By an ordinary incident of a mortgage the mortgagee becomes owner of the thing mortgaged; and, by sect. 70, it is implied that the mortgagee of a ship, by reason of his mortgage, is to be deemed the owner to an extent which is inconsistent with the alleged right of another creditor to seize and sell the ship. Even if the registration was imperfect, I am of opinion that the execution-creditor made a wrongful seizure as against the mortgagee.

WIGHTMAN, J.—Assuming the facts to be, that the execution-creditor had judgment and execution after the mortgage and before it was perfectly registered, the *question is, what, under such circumstances, were the rights of the mortgagee. That depends upon the true construction of sect. 70. If it had stopped before the word "except," the argument in favour of the creditor's right to seize might

have availed: but such right seems to me to be wholly inconsistent with the latter part of that section. I therefore am of opinion that he had no such right, either by virtue of the statute or otherwise.

CROMPTON, J.—The question in this case arose upon the mortgagee of the ship coming in under the interpleader process to claim the ship as owner as against the execution-creditor. By the ordinary incident of the conveyance to him by way of mortgage, he would be owner. The question therefore is, whether the conveyance by way of mortgage, under sect. 66 of the statute, is an ordinary mortgage. If it is, the mortgagee is thereby, by reason of such mortgage, become the owner of the ship as against a subsequent execution at the suit of a creditor. I am of opinion that the mortgage under the statute is an ordinary mortgage with ordinary incidents. It seems to me that none of these ordinary incidents are taken away by sect. 70. That section was intended to protect a mortgagee taking possession of a mortgaged ship, in order to make it available as a security from certain liabilities which frequently attach upon an owner of a ship in possession. But here no such question was raised. The question was, whether the claimant under the interpleader was the owner as against the execution-creditor; and I am of opinion that he made out that he was.

Judgment reversed.(a)

(a) Reported by W. B. Brett, Esq.

*The Company of Proprietors of the SOUTHAMPTON and
ITCHIN Floating Bridge and Roads v. The Local Board of Health of SOUTHAMPTON. Jan. 19. [*801

In an action brought against The Local Board of Health of S., it was averred in the declaration that the defendants were The Local Board of Health of S., i. e., The Local Board of Health duly established and constituted according to law, in and for the entire area, places and parts of places within the boundaries of S., as the same were fixed by The Municipal Corporation Act; and that the defendants, acting as such Local Board as aforesaid, conducted themselves so wrongfully, improperly, and negligently, and with such want of due and proper care in the construction, management, and direction of a certain sewer and certain sewage within their said district, that, by and through means of the wrongful, improper, and negligent conduct of the defendants, and their want of due and proper care as such Local Board as aforesaid in and about the premises, great quantities of filth and sewage-matter were poured in and upon certain canals, approaches and works of a certain bridge, of which the plaintiffs were the proprietors.

Held, upon demurrer to the declaration, that such an action for negligence was properly brought against The Local Board of Health, eo nomine; for that such a wrong was not the subject of compensation under sect. 144 of The Public Health Act, 1848 (stat. 11 & 12 Vict. c. 63), and that it was contemplated in sect. 139 that an action might be maintained for such a wrong against the Local Board eo nomine.

Quære, whether the Local Board are authorized by the statute to pay the damages recovered in such an action out of any of the rates which they are authorized to levy by the Act.

DECLARATION. The Company of Proprietors of the Southampton and Itchin Floating Bridge and Roads, by, &c., sue The Local Board of Health of Southampton, that is to say, The Local Board of Health duly established and constituted according to law in and for the entire area, places and parts of places within the boundaries of the town of Southampton, as the same were fixed for the purposes of an Act for the

regulation of Municipal Corporations in England and Wales, to wit, the Act passed in the 6th year of the reign of King William the 4th, intitled "An Act to provide for the regulation of Municipal Corporations in England and Wales:" For that the plaintiffs, at the time, &c., were lawfully possessed, and had the due management and control, of a certain floating bridge over the river *Itchin, and of certain canals, *802] approaches, and works connected with the said bridge, and were lawfully entitled to receive divers tolls and profits, for and in respect of passengers and traffic over the said bridge, under and in accordance with the several statutes in that behalf made and provided; and the defendants, acting as such Local Board as aforesaid, conducted themselves so wrongfully, improperly, and negligently, and with such want of due and proper care, in the construction, management, and direction of a certain sewer and certain sewage within their said district, that, by and through means of the wrongful, improper, and negligent conduct of the defendants, and their want of due and proper care, as such Local Board as aforesaid, in and about the premises, great quantities of filth and sewage matter were, and are continually, poured in, upon, and about the said canals, approaches, and works connected with the said bridge as aforesaid, and, notwithstanding the defendants have had full notice thereof, so as greatly to obstruct and damage the same and the said bridge, and to impede the working of the same by the plaintiffs, and so also as to create and cause in and about and over the same offensive and pernicious stench and effluvia, to the great detriment and injury of the plaintiffs in their said use of the bridge, and their profit and advantage therein: and the plaintiffs say that, by reason of the premises and the misconduct and default of the defendants as aforesaid, and in consequence thereof, the plaintiffs have not only sustained great damage and injury to their said canals and premises, but also have been, and are continually, put to great expense in removing, and endeavouring to remove, the said filth and sewage matter from their said *803] canals, approaches, *works, and premises, and have also been deprived of tolls, &c.; and the plaintiffs say that everything has happened and been done to entitle the plaintiffs to sue the defendants, and to render the defendants liable in this action for the injuries and damage aforesaid.

Demurrer. Joinder.(a)

- (a) Where, in an action brought against a Local Board of Health for a thing done under stat. 11 & 12 Vict. c. 63, the cause of action occurred within the town and county of S., and a judge's order was obtained to change the venue to the adjoining county under stat. 38 G. 3, c. 52, s. 1: Held that such order was properly made; for that the power of the Court to make such order is not abrogated by stat. 11 & 12 Vict. c. 63, s. 139.

The venue in this case was originally laid in the town and county of Southampton, within which the cause of action arose. The defendants, besides demurring to the declaration, pleaded Not guilty by statute, and afterwards obtained an order under stat. 38 G. 3, c. 52, s. 1, from Crompton, J., to change the venue to the county of Southampton, the next adjoining county.

H. Bullar afterwards (November 25, 1857), moved upon affidavits for a rule calling upon the defendants to show cause why the order of Crompton, J., should not be set aside.—The cause of action is one arising under The Public Health Act, 1848 (11 and 12 Vict. c. 63). By sect. 139 every action brought for anything done under the act "shall be laid and tried in the county or place where the cause of action occurred, and not elsewhere." The cause of action in this case occurred entirely within the town and county of Southampton. The order was made under sect. 1 of 38 G. 3, c. 52, by which "in every action, whether the same be transitory or local,

**H. Bullar*, for the defendants.—No action for negligence lies against a Local Board of Health, so that they can be sued upon [804] *it eo nomine*. It cannot be collected from the declaration which of the kinds of Local Board indicated in sects. 12 and 13 of The Public Health Act, 1848 (11 & 12 Vict. c. 63), this Local Board is; but, whichever it may be, the plaintiffs have sued a wrong defendant. For, if this be the Local Board of a district, exclusively consisting of the whole or part of one corporate borough, "the Mayor, aldermen, and burgesses" of such borough would, by sect. 12, be *the Local Board of Health, and [805] should be the defendants. Or, if this be the Local Board of any [805] of the other kinds of districts mentioned in sects. 12 & 13, then, by sect. 138, such Local Board of Health should be sued in the name of their clerk for the time being. [WIGHTMAN, J.—If in truth this be such a district that the Mayor, aldermen, and burgesses are really the defendants, may they not be sued by the name of The Local Board of Health?] No; they would be then sued as a corporation, and should be sued by their proper corporate name. [CROMPTON, J.—The defendants are sued without surname or Christian name given, which shows that they are sued as a corporation. If, being so sued, they are sued by a wrong corporate name, that is only matter for a plea in abatement. That has been so held ever since the case of *Regina v. The Bailiffs, &c., of Ipswich*, 2 *Ld. Raym.* 1232. Lord CAMPBELL, C. J.—I think we must assume

which shall be prosecuted or depending in any of His Majesty's Courts of record at Westminster, and in every indictment removed into His Majesty's Court of King's Bench by writ of certiorari, and in every information filed by His Majesty's attorney or solicitor general, or by the leave of the Court of King's Bench, and in all cases where any person or persons shall plead to or traverse any of the facts contained in the return to any writ of mandamus, if the venue in such action, indictment, or information, be laid in the county of any city or town corporate within that part of Great Britain called England, or if such writ of mandamus be directed to any person or persons, body politic and corporate, that it shall and may be lawful for the Court in which such action, indictment, information, or other proceeding shall be depending, at the prayer and instance of any prosecutor or plaintiff, or of any defendant, to direct the issue or issues joined in such action, indictment, information, or proceeding, to be tried by a jury of the county next adjoining to the county of such city or town corporate, and to award proper writs of venire and distringas accordingly, if the said Court shall think it fit and proper so to do." But the power given under that Act is abrogated in this case by stat. 11 & 12 Vict. c. 63, s. 139, which directs that such an action as this shall be laid and tried in the county or place where the cause of action occurred, and not elsewhere. There was therefore no jurisdiction to make the order. [Lord CAMPBELL, C. J.—The power of this Court to change the venue is a common law power. Words should be very strong which are relied upon to take away such power. Suppose in such a case as this no disinterested jury could be collected in the town, do you say the power of the Court to change the venue is in such case ousted by the statute?] If that power is not abridged by the enactments, the words "and not elsewhere" have no force whatever. [Lord CAMPBELL, C. J.—May not the meaning be that the plaintiff must lay and try his cause in the particular county unless the Court make an order to the contrary?] The legislature, when passing the later Act, are to be assumed to have borne the other in mind.

Lord CAMPBELL, C. J.—*Mr. Bullar* has very clearly and forcibly put the ground of his motion; but he has not persuaded me that the enactment on which he relies was intended to put an end to the discretion of the Court to change the venue in such an action as this, where the ends of justice require it. The meaning of the section seems to me that which was suggested during the argument.

(COLERIDGE, J., was absent.)

WIGHTMAN, J., concurred.

ELLIS, J.—I do not think that the legislature intended to take away any power from the Court: it only means to say that the party shall lay the venue in the place where the cause of action occurred, and try the cause there, unless the Court make an order to change the venue.

Rule refused.

that the action is brought against the defendants as a corporation, and therefore, upon this demurrer, as the Local Board of Health of a corporate district. If they are sued by a wrong corporate name, you should have pleaded in abatement.] Secondly, though the defendants be sued by a sufficient description, yet no such action as this is lies against a Local Board of Health at all. The ground of complaint alleged in the declaration must be either that an act has been done which is wholly beyond the statute, or that an act has been done under the statute. If it be an act wholly beyond the statute, as an injury done by the defendants or ordered to be done *malâ fide*, those persons who did it or ordered it to be done should have been sued individually. If it be within the *806] statute, that is, an act *bonâ fide* intended to be properly done under the powers of the statute, but so improperly done as wrongfully to injure the plaintiffs, the only legal remedy of the plaintiffs is to obtain full compensation under sect. 144, by which "full compensation shall be made, out of the general or special district rates to be levied under this Act, to all persons sustaining any damage by reason of the exercise of any of the powers of this Act," &c. For, if such an injury be done as is last described, it is expressly declared by sect. 140 that no action shall be maintainable against the Local Board, or any individual of it, for any act done *bonâ fide* for the purpose of executing the Act. [CROMPTON, J.—The terms of sect. 140 are: "that no matter or thing done or contract entered into by the Local Board of Health, nor any matter or thing done by any superintending inspector, or any member of the said Local Board, or by the officer of health, clerk, surveyor, inspector of nuisances, or other officer or person whomsoever acting under the direction of the said Local Board, shall, if the matter or thing were done or the contract were entered into *bonâ fide* for the purpose of executing this Act, subject them or any of them personally to any action, liability, claim, or demand whatsoever; and any expenses incurred by any such Local Board," &c., "acting as last aforesaid, shall be borne and repaid out of the general district rates," &c. Does that protect the Local Board from being liable to be sued as a Board for negligence, though committed in the doing of some *bonâ fide* act? Does it say more than that no member of the Board shall in such case be personally liable?] If the enactment do not extend to protect the Board, but only the members of it as individuals, then it must be inferred from the whole Act *807] that compensation under sect. 144 was intended by the Legislature to be the only remedy, because then no individuals are to be made liable, and there are no funds out of which the Board could pay the damages to be recovered in an action. The only funds given to the Board by the statute are the rates specified in sects. 86 and 87; and they are applicable by those sections to the purposes specified therein; among which purposes the supposed one of paying damages assessed in an action is not mentioned. In *Fooffees of Heriot's Hospital v. Ross*, 12 Cl. & F. 507, it was held that trustees of corporate funds applicable to particular purposes could not, because the funds were only so applicable, be made to pay out of the corporate funds damages recovered in a suit against the trustees for an injury done by them as trustees in the management of their trust. The same point was decided, in *Duncan v. Findlater*, 6 Cl. & F. 894, in the case of road trustees. The want of any funds in the hands of such a body wherewith to pay damages was relied upon by

the Court to show that no duty attached upon the body so as to make them liable as such for a breach of duty, in *Metcalf v. Hetherington*, 11 Exch. 257,† and in *Gibbs v. Trustees of the Liverpool Docks*, 1 H. & N. 439.† [CROMPTON, J.—*Gibbs v. Trustees of the Liverpool Docks* is now standing for judgment in the Exchequer Chamber.(a) WIGHTMAN, J.—Does sect. 144 apply to the case of an act which, though it be done under the statute, is negligently done; or does it apply only to acts rightfully and rightly done under the statute, but to the injury of certain individuals?] It applies to both cases; else there is no *remedy [*808 at all for any one injured by the negligent performance of an act done under the statute. The manner in which provisions like those in sect. 144 are to be applied may be deduced from *Regina v. Metropolitan Commissioners of Sewers*, 1 E. & B. 694 (E. C. L. R. vol. 72) and from *Bradby v. Southampton Local Board of Health*, 4 E. & B. 1014 (E. C. L. R. vol. 82). [WIGHTMAN, J.—Is it not to be inferred from *Ward v. Lee*, 7 E. & B. 426 (E. C. L. R. vol. 90), that, where a statute, such as this is, protects the individuals acting under such a Board for acts done by order of the Board, there must be a right of action against the Board?] No: it only decides that no action could be maintained against a person acting bonâ fide under this Board, because such person would be protected by sect. 140; it does not show that the Board should not pay compensation, under sect. 144, in such a case. [WIGHTMAN, J.—But, if you admit that the Board is bound to pay compensation for such injuries, do you not admit that there are funds applicable to the payment of amends for such injuries? And is not your argument against the maintenance of an action thereby greatly weakened?] The true distinction is taken in *Boyfield v. Porter*, 13 East 200, where it is pointed out that injurious acts done bonâ fide are the subject of compensation, but that such acts done malâ fide are the subject of action against individuals.

Karslake, for the plaintiffs.—The declaration charges the defendants with an injury caused by their negligence. Primâ facie that is a cause of action. The question is, whether any exemption of these defendants has been shown against this primâ facie case. [Lord CAMPBELL, C. J.—I do not agree that a body, constituted as this is, is primâ facie liable to an action of this sort.] The question is, *what is the legal [*809 remedy of a person injured by an act done under an order of a Local Board of Health, which act has been bonâ fide but negligently executed by the servants or agents of the Board in pursuance of that order. It is said that the remedy is by compensation to be awarded under sect. 144: but that is not so. It was held in *Scott v. Mayor, &c., of Manchester*, 2 H. & N. 204,(b) that such a section applies only to the case of an act rightly done, not only in pursuance of, but as authorized by, the statute. Is there then no remedy? It is said that it is to be inferred from the statute that no action can be maintained against the Board as a Board. But first it is expressly said, in sect. 138, that in the case of a non-corporate district The Local Board of Health may be

(a) *Gibbs v. Trustees of the Liverpool Docks*, 3 H. & N. 164,† in Exch. Ch., where (after the decision of the present case) the judgment of the Court of Exch. was reversed, and the trustees were held to be liable.

(b) In Exch. Ch., affirming the judgment of Exch. in *Scott v. Mayor of Manchester*, 1 H. & N. 59.†

sued in the name of their clerk for the time being for or relating to any matter or thing done by them under the provisions of the Act; and that must mean for some matter or thing wrongfully done; for any injury caused by the doing of anything according to the Act is matter of compensation under sect. 144. And, if the Local Board of a non-corporate district can be sued, though they are to be sued in the name of their clerk, it would seem to follow that the Local Board of Health of a corporate district may also be sued; and, if sued, they must be sued in their own name. But it is said that there are no funds out of which the Board could pay damages recovered in an action. First, it does not follow that, if that were so, no action could be maintained: *Kendall v. King*, 17 Com. B. 488 (E. C. L. R. vol. 84); *Pallister v. The Mayor, &c., of Gravesend*, 9 Com. B. 774 (E. C. L. R. vol. 67). And, secondly, it may be that the statute contemplates the payment of such damages out *810] of the funds mentioned in sections 86, 87; for in the case of the non-corporate districts it is clearly stated, as has been shown, that an action may be maintained; and it is as clearly stated, in sect. 138, that in that case the Board are ultimately, if not immediately, to pay the damages recovered and the costs. That must be out of the funds mentioned in sections 86, 87; for there are no others. And, if the damages in such case are to be paid by the Board out of those funds, there seems to be no valid reason why they are not, in the like case, to be paid by the Board of a corporate district out of the same funds. But, again, the statute seems distinctly to recognise that an action may be maintained against every Local Board; for in sect. 139 it is stated, amongst other things, that no writ or process shall be sued out against the Local Board of Health until the expiration of one month next after notice in writing shall have been left at their office. The section goes on to say that the defendants mentioned in the section, among whom it is to be taken that the Board just mentioned is one, may tender amends. That can be only out of the funds before mentioned. [Lord CAMPBELL, C. J.—Suppose the act to be done by an order of the Board in a matter clearly not within their power?] Still the plaintiff might sue them, and be entitled to be paid out of the rates. [Lord CAMPBELL, C. J.—That seems to be a great hardship on the rate-payers.] The enactments as to bona fides exempt the members of the Board from personal liability only. It would be hard on the members of the Board to be made liable for an order erroneously given to do a thing not within the statute. It would be hard on the persons injured to be without remedy. The rate-payers *811] elect the Board; and therefore the hardship is not an injustice *as against them. [Lord CAMPBELL, C. J.—If you can show any possible case in which such an action could be maintained, you succeed. In such case an answer, if there be one, should come by way of plea.] By sects. 43 and 45 the Board are authorized to construct sewers. By sect. 46 they are authorized to discharge those sewers in proper places, and in a proper way. Suppose the Board to give an order as to the mode of discharging a sewer, which order is bona fide obeyed, but it turns out that the order was an unskilful or negligent one, whereby a person is injured. By sect. 140 the person can maintain no action against the actual wrongdoer; he cannot recover compensation under sect. 144; it follows that he has no remedy, if it be not the action against the Board itself contemplated in sect. 139. None of the cases cited on

the other side are applicable. In *Feoffees of Heriot's Hospital v. Ross*, 12 Cl. & F. 507, and in *Duncan v. Findlater*, 6 Cl. & F. 894, there was no negligence charged against the trustees; and they were gratuitous trustees. But it is stated in *Roscoe's Digest of the Law of Evidence at Nisi Prius* (ed. 9 by Smirke, p. 490), that where trustees for public purposes act negligently or beyond their authority they are liable to an action. In *Metcalfe v. Hetherington*, 11 Exch. 257,† and *Gibbs v. Trustees of the Liverpool Docks*, 1 H. & N. 439,† it was held that no duty was shown upon the face of the declaration to do the act which it was alleged ought to have been done. In *Bradby v. Southampton Board of Health*, 4 E. & B. 1014 (E. C. L. R. vol. 82), it is only decided that sect. 144 is applicable where there is no dispute as to the liability.

H. Bullar, in reply.

*Lord CAMPBELL, C. J.—I am of opinion that the plaintiffs are entitled to judgment. These Local Boards of Health are very peculiar bodies, the creatures of statute, to whom very extraordinary powers are given, and who may therefore reasonably be made liable to unusual liabilities. What that liability is, if any, must be determined by a true interpretation of the statute by which they are created. The Scotch cases therefore of *Feoffees of Heriot's Hospital v. Ross*, and *Duncan v. Findlater*, cannot assist the Court. Looking to the statute in question, it seems to me that the Local Board of Health thereby created is therein considered to be liable for a wrong such as is charged in this declaration. I am clearly of opinion that such a wrong is not within the compensation clause, sect. 144. There is no legal mode left of fixing the Board with such a liability but by an action. The question is, what is to be the form of that action. If there be any case in which the Board may be made liable in an action against the Board *eo nomine*, this may be one; and then the declaration is good, and must be answered, if it can be answered, by plea. But it seems to be assumed in sect. 139 that there may be an action against the Board for a wrong; for it says that the Board, when sued, may tender amends, which can only be applicable to an action for a wrong. Two difficulties however are suggested to this solution. First, it is said that there are no funds which can be in the hands of the Board applicable to the payment of damages recovered in an action. No doubt there is difficulty in this matter. It may be that such damages are to be paid out of the general district-rate. However, it is not necessary now to determine that *point; and I desire to express no opinion upon it. But, secondly, it is said that, if such a payment can be made out of the rates by the Board, it is a great hardship on the rate payers to be made to pay for the blunders or neglect of the Board. That objection, however, seems to be met by the consideration that the members of the Board are elected by the rate-payers, and are therefore their representatives. There would be greater injustice, perhaps, if it were held that persons injured by the negligence or wrongful acts of the Board had no remedy. I am upon the whole of opinion that an action for negligence may be maintained against the Local Board of Health.

(COLERIDGE, J., was absent.)

WIGHTMAN, J.—I am of opinion that the declaration discloses a state of facts, upon which, *primâ facie*, the Local Board of Health may be held liable to an action brought against them *eo nomine*. It is said by

the plaintiffs that, for an injury done to individuals by works ordered by a Local Board of Health, which works it is within the jurisdiction of the Board to order, and which are so far properly ordered by them, but which works when executed by their agents are so executed as to do injury, the Board are liable to an action. It is said, on behalf of the defendants, that no such action lies in such case against the Board, but should be brought, if against any one, against the individuals who ordered that particular work. The decision depends upon the construction of the statute. Assume work injurious to an individual to be done by an agent of the Board by order of the Board, and the jury to find that the work was ordered and done *bonâ fide* in execution of the Act, *814] *then by sect. 140 the agent is not to be personally liable, nor are the members of the Board to be individually liable; and, if an action be brought either against the agent or any member of the Board individually, his expenses are to be paid out of the rates: then the ratepayers are ultimately liable. It does not seem to be a greater hardship on them to say that an action may be brought against the Board, and that the damages may be paid out of the general rate. It is not necessary, however, to determine on this occasion what is the true construction of this particular statute as to that point. The only question now is, whether an action for a wrong will lie against the Local Board *eo nomine*. By sect. 139 the case is put of an action brought against the Local Board; and it is said that in such case such action shall not be maintained unless previous notice thereof has been left one month before action at the office of the Board. It is further said that the defendant in such action may tender amends, and may plead such tender to the action. These enactments seem to assume that an action for a wrong may be brought against a Local Board of Health, and that The Local Board of Health may plead to such action. Then this declaration is *primâ facie* sufficient, and must be answered by plea. It is unnecessary to decide now what fund, if any, is liable to pay the damages.

CROMPTON, J.—Looking at the whole of the statute, it seems to me that it contemplates that actions of this nature may be maintained against a Local Board of Health. Judgment for plaintiffs.(a)

(a) Reported by W. B. Brett, Esq.

*815] *JOHN SCOTT the Younger v. LITTLEDALE and Others.
Jan. 19.

Declaration for non-delivery of 100 chests of tea ex the ship E., sold by the defendant to the plaintiff at a fixed price, with the usual averments that plaintiff was always ready and willing, &c., and that all conditions precedent were fulfilled. Equitable plea, that the tea was bought and sold upon a sample which the defendants believed to be a sample of the said tea ex the said ship, and that by the said contract the defendants agreed that the tea in the said 100 chests should be equal to the said sample; that the said sample was not a sample at all of the said 100 chests, but was a sample of a totally different tea; and that the defendants afterwards discovered that there had been a mistake respecting the said sample, and forthwith, and before the plaintiff had in any respect altered his position on account of the said contract having been made, gave notice of such mistake to the plaintiffs, and that the defendants would, on account of the said mistake, treat the contract as void; and the contract was

entered into solely through the mistaken belief of both parties that the said sample was a sample of the 100 chests, and would not have been entered into but for the said mistake. Held, upon demurrer to an equitable replication, that the plea was bad, because it failed to show that a Court of Equity would have granted a simple relief in favour of the defendants against their liability to deliver the tea *ex the ship* S.

DECLARATION: that the defendants bargained and sold to the plaintiff, on the usual conditions of private sales, 100 chests of Congou tea, then lying in bond, "*ex the Ship Star of the East*," at the price of 1s. 3½d. per pound, the said tea to be delivered on payment, &c. **Averments:** that the plaintiff had always been ready and willing to do and had done all things necessary on his part which he should be ready and willing to do and should do; of the fulfilment of all conditions precedent; and that all time has elapsed, &c. **Breach:** the non-delivery of the said tea. **Special damage,** that the plaintiff, relying, &c., had made a resale of the tea to one Peter Cornthwaite, at advanced prices, and had been obliged to break his contract, and had thereby lost profits, and had become liable to damages.

Plea, being a defence on equitable grounds, that, before the defendants entered into the said contract with the plaintiff, they, the defendants, had in their possession a certain sample of tea, which had been *delivered to them as, and which they believed to be, a sample [*816 of the said 100 chests of tea *ex the ship Star of the East*; and that they, the defendants, before the said contract was made, delivered to one Rae, who was a broker employed by the plaintiff to purchase tea for him, a sample taken from the said sample as and for a sample of the said 100 chests of tea, *ex the Star of the East*; and that afterwards the said contract between the plaintiff and the defendants was made through the agency of the said Rae as such broker as aforesaid; and by the said contract the defendants agreed that the tea in the said 100 chests should be equal to the said sample; and that the said sample, which was so in the possession of the defendants before they made the said contract, and of which the defendants so as aforesaid delivered a portion to the said Rae, was not a sample at all of the said 100 chests of tea, *ex the Star of the East*, but was a sample of a totally different tea; and that they, the defendants, afterwards, and on the same day when the said contract had been entered into, discovered that there had been a mistake respecting the said sample, and forthwith, and before the plaintiff had in any respect altered his position on account of the said contract having been made, gave notice of the said mistake respecting the said sample to the said Rae, and to the plaintiff, and gave notice to them that the defendants would, on account of the said mistake, treat the said contract as void; and that the said contract was entered into solely through the mistaken belief, on the part of the defendants and the said Rae, that the said sample was a sample of the tea in the said 100 chests, and would not have been entered into but for the said mistake.

***Replication,** on equitable grounds, that, after the said con- tract between the plaintiff and the defendant had been entered [*817 into, as in the said declaration mentioned, but immediately afterwards, and on the same day that such contract was so entered into, and before the defendants gave the said alleged notice of the said alleged mistake respecting the said sample, either to the said Rae or to the plaintiff, and before they gave the alleged notice either to the said Rae or to the

plaintiff, that the defendants would, on account of the said alleged mistake, treat the said contract as void, the plaintiff, then having in his possession the said sample of the said tea which had been so delivered by the defendants to the said Rae, then showed the same sample to one Thomas Waistell, who was a tea-broker employed by the said Peter Cornthwaite in the declaration mentioned to purchase tea for him; and the plaintiff then offered to the said Thomas Waistell, as such broker as aforesaid, to sell through him to the said Peter Cornthwaite the said 100 chests of tea, ex the Star of the East, which the plaintiff had so contracted to purchase of the defendants as aforesaid, at the said increased and advantageous prices in the declaration mentioned; and the plaintiff then delivered to the said T. W., as such broker, a sample taken from the said sample delivered to the said Rae, and then in the plaintiff's possession, as and for a sample of the said 100 chests of tea, ex the Star of the East, offered by him the plaintiff for sale as aforesaid: but, the said T. W. being then unable to purchase the said tea on the behalf of the said P. C. without first seeing his principal, it was then and on the same day of the said contract between the plaintiff and the defendants being *818] entered into, and before the *defendants gave either of the said alleged notices in the second plea mentioned, either to the said Rea or to the plaintiff, verbally agreed between the plaintiff and the said T. W., as such broker, that the said T. W. should take the said sample so delivered to him and ascertain whether the said P. C. would purchase the said 100 chests of tea, ex Star of the East, at the said prices upon the said sample, and that he should give the plaintiff a final answer as to a purchase in the afternoon of that day, but that, if he did not, it was then verbally agreed between the plaintiff and the said T. W., as such broker, that he should have the said tea left on "offer" until the said period of time of the next succeeding day. And the plaintiff says that, before and at the time of entering into such verbal agreement with the said T. W., as such broker, he the plaintiff was, and still is, a tea-merchant, carrying on business at Liverpool, in the county of Lancaster; and it then was, and still is, a well known and established rule and usage in the tea trade at that place, being the place where the contract between the plaintiff and the defendants was entered into, and also the place where the said agreement between the plaintiff and the said T. W. was entered into, the place being the same in either case, that the tea-broker with whom a tea-merchant might agree that teas offered to him for sale should be left on "offer," as aforesaid, should have and had a right to take and purchase such teas on the behalf of his principal, at the price named, at any time before or at the expiration of the agreed period of time in that behalf, and at or before the expiration of such agreed time to call upon such tea merchant to enter into a binding legal contract accordingly. And the plaintiff says that, by the same usage *819] and rule *of the tea trade at the place aforesaid, if any tea-merchant who should have entered into any such verbal agreement with a tea-broker, that tea for sale should be "left on offer," as aforesaid, should, before or at the expiration of the agreed time in that behalf, refuse to sell the said tea, through such broker, at the price named, or to enter into a binding legal contract in that behalf, he could only do so at the risk of losing his credit and standing in the trade, and to his serious injury and prejudice in his trade. That, the said T. W.,

as such broker as aforesaid, on the behalf of the said P. C., having afterwards and after the giving of the said alleged notices to the said Rae and to the plaintiff, and before the expiration of the said agreed time, informed the plaintiff that the said P. C. would purchase the said 100 chests of tea, ex Star of the East, at the said price named upon the said sample so delivered to the said T. W., and having then, before the expiration of the said agreed time in that behalf, called upon the plaintiff to enter into a binding legal written contract for the sale to the said P. C. of the said 100 chests of tea, ex the Star of the East, he the plaintiff, then and before the expiration of the said agreed period of time, did enter into a binding legal written contract through the said T. W., as such broker as aforesaid, for the resale to the said P. C. of the said 100 chests of tea, ex the Star of the East, to wit, the said sub-contract in the declaration mentioned, as the plaintiff was bound, in honour and equity, to do by the rule and usage of the tea trade aforesaid under the penalty aforesaid.

Demurrer. Joinder.

Mellish, in support of the demurrer.—The plea is good; *and the replication is bad. First, as to the plea. It discloses that [*820 the contract sued on was founded on a mistake by both contracting parties of a material fact on which it was founded, and that the plaintiff had notice of the mistake before his position was altered. The mistake of fact was: that the sample on which the contract was made was by mistake supposed to be a sample taken from the cargo which was bought and sold, whereas it was not. The consequence was that the defendants could not possibly perform the contract. [Lord CAMPBELL, C. J.—Why not? They might have purchased tea equal to the sample and delivered it.] That would not have been a fulfilment of this contract, which was for the purchase and sale of a specific cargo ex Star. [CROMPTON, J.—The plaintiff by his declaration says that he was always ready and willing to accept the cargo ex Star; if he was, were not you bound at least to deliver that cargo? Do you not claim too large a relief?] In the contemplation of a Court of equity there was no contract, because the contract was founded on a mistake of both parties to it. A Court of equity will relieve against a contract made on a mistake of facts by both parties; Story's Commentaries on Equity Jurisprudence, cap. 5, § 134; though not where compensation cannot be made to the party against whom relief is sought: *M'Alphine v. Swift*, 1 Ball & B. 285. [CROMPTON, J.—Suppose that the defendants had sought relief against the whole contract in equity, and that the plaintiff had answered that he was ready to accept the cargo ex Star without insisting upon any claim for a difference in quality between it and the sample: would the Court have relieved against the whole contract, or would they have enforced the contract and relieved only *against the term in it as to sample?] They would [*821 have relieved against the whole contract, because it was founded solely on the sample, and that was a mistake. [CROMPTON, J.—Is the contract more than an undertaking to deliver tea equal to sample if the vendee insist on it? If he do not insist, will equity decree that the vendor need not deliver any tea? Lord CAMPBELL, C. J.—Would equity at the mere option of the vendor simply rescind the contract? That is what you ask us to do.] No doubt it is necessary to show, not only that equity would grant relief, but that it would grant such relief

as this Court will alone grant, namely, simple, complete, unconditioned relief. It would grant such relief in this case, because the contract was entirely based upon the supposed truth of a fact as to which both parties were mistaken. [CROMPTON, J.—We say, not that there is no equity, but that the equity, which would be given elsewhere, is not such an equity as this Court can administer or recognise.]

Hugh Hill, *contra*, was not called on.

LORD CAMPBELL, C. J.—We are all of opinion that the plea cannot be supported. It is founded on the assumption that in equity this contract would be void at the option of the vendor. But we are of opinion that the contract would be held to be still subsisting, and that the relief in equity, if any, would be partial or conditional. We have no authority in this Court to settle such equities.

COLERIDGE, WIGHTMAN, and CROMPTON, Js., concurred.

Judgment for plaintiff.(a)

(a) Reported by W. B. Brett, Esq.

Equity will relieve against a mutual mistake in a contract where one party supposed himself to be selling and the other to be buying a thing which did not, in fact, exist: *Mason v. Bennett*, 8 Paige 321; *Allen v. Hammond*, 11 Peters 71; *Gouverneur v. Titus*, 1 Edw. Ch. 477. But in this and in all other similar cases, except where there has been actual fraud, the appropriate relief, especially where the application is for a rescission of the contract, will only be granted upon the terms of placing the other party *in statu quo*, as by a return of the purchase-money, an account of and allowance for improvements, and the like: *Griffith v. Frederick Co. Bank*, 6 Gill & Johns. 424; *Martin v. Broadus*, 1 Freem. Ch. 35; *William v. Wilson*, 1 Dana 157; *Shaef-fer v. Slade*, 7 Blackf. 178; *Keltner v. Keltner*, 6 B. Monr. 40; *Barbour v. Morris*, Id. 120; *Coppedge v. Threadgill*, 3 Sneed 577. So where there has been a mutual mistake as to the quan-

tity of the thing sold, the vendee may insist on a specific performance to the extent of the vendor's ability, with an abatement of the purchase-money or compensation for the difference: *Waters v. Travis*, 9 Johns. 161; *Wisswall v. McGowan*, 1 Hoff. Ch. 125; *Vorhees v. De Meyer*, 2 Barb. S. C. 37; *Ketchum v. Stout*, 20 Ohio 453; *Wilson v. Brumfield*, 8 Blackf. 146; *Henry v. Sells*, 2 Ired. Ch. 407; *Weatherford v. Jane*, 2 Alab. 170; *Bass v. Gilliland*, 5 Id. 761; *Jones v. Shackelford*, 2 Bibb 410; *Evans v. Kingsbury*, 2 Rand. 120. And in general it may be said in the language of Ch. J. Marshall, in *McFerran v. Taylor*, 3 Cranch 271: He who sells property on a description given by himself, is bound to make good that description, and if it be untrue in a material point, although the variation be occasioned by a mistake, he must still remain liable for the variance.

*Ex parte MONROE. Jan. 20.

[*822

M. was adjudicated bankrupt, but did not surrender. Afterwards he petitioned the Bankruptcy Court to be allowed to surrender: but, he not having appeared to support his petition, it was dismissed with costs, for which, by virtue of an order of the Bankruptcy Court, he was taken under a ca. sa. Afterwards, he petitioned the Bankruptcy Court again to be allowed to surrender: but that Court refused to hear him till the costs should be paid. He then renewed an application for his discharge under the Insolvency Acts which he had previously made to the county court, and which had been adjourned; when the judge adjourned the application sine die, with leave to him to come up upon giving ten days' notice.

On an application to this Court for an order to the county court judge to hear the application:

Held, that the judge had heard and decided; that the adjournment was warranted by stat. 1 & 2 Vict. c. 110, s. 72; but, even if it was not so warranted, that the judge would have only decided wrongly, but would not have declined jurisdiction.

Application refused.

Seable, that the proceedings in bankruptcy would have justified the county court judge in dismissing the petition absolutely.

C. G. MEREWETHER, in last Term, obtained a rule calling on Richard Wildman, Esq., the judge of the county court of Nottinghamshire, held at Nottingham, to show cause why he should not hear, determine, and adjudicate on the matters of the petition or schedule of William Horace Monroe, an insolvent debtor, filed in the said court, upon notice to the detaining creditors, or their attorney.

From the affidavit on which the rule was obtained it appeared that, on 29th September, 1856, Monroe was declared bankrupt; and his estate and effects were sold under the said bankruptcy. He did not surrender within the time allowed by law. In January, 1857, he presented a petition to the Court of Bankruptcy for the Birmingham District to be allowed to surrender: but, as he deposed, in consequence of an accident which occurred to the railway train by which he was travelling, he arrived too late at Nottingham, where the Court was held; and his petition was dismissed with costs; which costs were taxed at 17l. 10s. On 28th February, 1857, he was arrested on a ca. sa., granted on the order of the *Commissioner in Bankruptcy, for the 17l. 10s. [*823 He then, under the provisions of the Insolvent Debtors Acts, petitioned the county court of Nottinghamshire, at Nottingham; and appeared before that court for hearing on 9th June, 1857. The hearing was adjourned from time to time till 1st September, 1857; on which day the judge of the county court refused to adjudicate till Monroe had made another application to the Bankruptcy Court to be allowed to surrender. Monroe thereupon petitioned the Bankruptcy Court accordingly: and the petition was heard on 27th October, 1857; when the Commissioner refused to allow the surrender till the 17l. 10s. for costs should be paid. Monroe then applied again to the judge of the county court for relief: but the judge refused to adjudicate. Monroe deposed that he had no means of discharging the 17l. 10s.

In the affidavit in answer it was deposed that Monroe was also in custody at the suit of another person; and it was deposed, on belief, that the custody in this last case was at his own instance and for his own purposes. It also appeared that some of the adjournments in the county court were general and some to a day certain; that, in that court, it was urged that the court had no jurisdiction as long as the proceedings in the Bankruptcy Court were pending; that the county

court judge did not decide this question. That the Bankruptcy Commissioner, on 27th October, ordered that the bankrupt should pay the costs of his former application to surrender, discontinue an action which he had commenced against the official assignee and petitioning creditor, and give up his books; and that he might then be heard. That the last hearing of the adjourned application to the county court came on to be *824] heard there on the same *27th October, after the last-mentioned proceeding in the Bankruptcy Court, which was stated to the judge, who thereupon adjourned the application sine die, with leave to Monroe to come up again on giving ten days' notice; the judge intimating that he did not feel inclined to interfere so as to defeat the last-mentioned decision and order of the Bankruptcy Commissioner, and that Monroe must comply with the conditions imposed upon him.

In last Term, (a)

Bovill showed cause.—There has been no refusal to hear: the county court judge has only adjourned upon terms which were clearly in his discretion. And indeed, if he had discharged the petitioner, he would have been interfering with the operation of the bankruptcy law. By sect. 259 of The Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), a bankrupt taken in execution after the refusal of protection "shall not be discharged from such execution until he shall have been in prison for the full period of one year, except by order of the Court." But, till surrender, there can be no protection. This is also in the nature of a suspension of a certificate, to which the same consequence is attached by the same section. At any rate, sect. 72 of stat. 1 & 2 Vict. c. 110, gives full discretionary power to the judge in the insolvency proceeding to adjourn as often as he thinks right.

C. G. Mereuether, contra.—The affidavit expressly states that the judge refused to adjudicate. He clearly could not adjourn sine die: *825] that would be a refusal to *adjudicate. But, for the purpose, as it should seem, of making the order formally good, the order allows the insolvent to come up on giving ten days' notice. That, however, is an indefinite adjournment. Sect. 259 of stat. 12 and 13 Vict. c. 106, applies only to proceedings in bankruptcy: and, even as to them, is inapplicable here, there not having been, properly speaking, either a refusal of protection or a suspension of the certificate. The insolvent has no means of relieving himself from imprisonment, supposing this rule to be discharged, inasmuch as he cannot pay the adjudged costs. But sect. 85 of stat. 1 & 2 Vict. c. 110, empowers him to petition for his discharge, and for liberty of his person against the demand for which he is in custody and the demands of all other persons claiming to be creditors: and sect. 70 directs that the Insolvency judge shall, on the filing of the schedule, forthwith appoint a time, in no case to be more than four calendar months from the date of the appointment, for the petitioner to be brought up. So that all turns on sect. 72, which authorizes no such adjournment as has been ordered in this case, but only an adjournment to a particular sitting, or circuit, or sessions. [ERLE, J.—The case seems to be this. The party is adjudged a bankrupt, and, being within the cognisance of the Bankruptcy Court, wishes to transfer himself to that of the Insolvency Court; and the latter Court

(a) Wednesday, November 25th. Before Lord Campbell, C. J., Wightman and Erle, Js.

adjourns the case till the question in the Bankruptcy Court is disposed of.] The property of the petitioner would still remain in the disposal of the Bankruptcy Court. [Lord CAMPBELL, C. J.—At present the creditors have also the security, such as it is, of his person.] The Bankruptcy Court will not lose its hold upon him by the proceedings in Insolvency. By sect. 79, *the costs which the petitioner is liable [*826 to are comprehended in the discharge. By sect. 76, the utmost time of detainer is six months from the vesting order, unless the penal clauses, 77, 78, apply to the case, which is not suggested here: and, even when they do, the utmost length of imprisonment is three years; whereas here the imprisonment may be indefinite. *Cur. adv. vult.*

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

This was a rule *Nisi*, calling on the judge of the county court to show cause why he should not hear, determine, and adjudicate on the matters of the petition and schedule of the applicant.

The rule is founded on the assumption that the judge of the inferior tribunal has declined a jurisdiction vested in him by law. If he has exercised that jurisdiction, if he has heard, and determined, and adjudicated, the rule must be discharged, whether we assent to his adjudication or not.

It appears by the affidavits that the judge, instead of declining the jurisdiction, has had repeated hearings of the applicant, and has, on the earlier hearings, adjudged that the matter should be adjourned to a future day named in the adjudication; and, at the last hearing, adjudged that the further hearing should be adjourned *sine die*, with leave to the applicant to come up again on giving ten days' notice. This adjudication is made after much consideration of the liabilities of the applicant, as a bankrupt, to the jurisdiction of the Commissioner in Bankruptcy, and of the duties of the Commissioner in Insolvency, in respect of the same *bankruptcy. The assumption therefore on which the rule [*827 was founded is disproved.

The statute gives an unlimited power to adjudicate that the further hearing should be adjourned, according to the discretion of the Commissioner. The words in sect. 72, relating to adjournment, are, "in case the said Court," &c., "shall entertain any doubt touching any matter alleged against such prisoner at such hearing, to prevent his or her discharge, or otherwise touching the schedule or the examination of such prisoner," "it shall be lawful for the said Court," &c., "to adjourn the hearing and examination of such prisoner" "to some future sitting of the said Court," &c.: and there is a proviso: "when any such hearing shall be adjourned by the said Court generally," "the said Court shall and may, upon the application of such prisoner, to be made within such time as the said Court shall direct, order the said prisoner to be brought up for hearing accordingly."

We consider that these words give power to adjourn to some future court day, to be ascertained if notice should be given: and, even if the adjudication of adjournment *sine die*, with liberty to apply again, was not authorized by the statute, it would be an informal or erroneous judgment, but not a declining of jurisdiction, and no ground for the present rule.

It is not within our province to express either our assent to or dissent from the decision given, or to suggest the form of argument or judg-

ment on any future occasion. But we may add that the inexpediency of allowing a bankrupt to frustrate the control of the judge in Bankruptcy by resorting to the judge in Insolvency might afford good ground for dismissing a petition, if the judge thought fit: and, although the *828] argument in *the present case was in form against the jurisdiction of the Commissioner in Insolvency, and the judgment was an adjournment sine die, the substance of the matter is that the petition is in effect dismissed on the ground contended for by the opposing creditor.

Rule discharged, with costs.

ARKLE v. HENZELL. Jan. 20.

H., the owner of the majority of the shares of a ship, being also ship's husband, and having (with the knowledge and consent of A., the master, who was also a part owner, and who acted under his orders) the management of the ship, required the master to deliver up the certificate of registry of the ship, which was then lying in her port of discharge, but had not discharged. H. intended to dismiss A. and appoint another master; but he had not communicated this intention to A., nor assigned any other reason for requiring the certificate. A. refused to deliver it up.

Held, that A. was not liable to a penalty under sect. 50 of The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), as having refused to deliver up the certificate to the person entitled to the custody thereof for the purposes of navigation, without a reasonable ground of refusal.

THE following case was stated by two justices of the borough of Tynemouth in Northumberland, under stat. 20 & 21 Vict. c. 43.

On the 29th October last, an information was laid under sect. 50 of The Merchant Shipping Act, 1854: For that the said John Manners Arkle, on 29th October, 1857, at the township of Tynemouth in the said borough, being then and there possessed of a certain certificate of registry of a certain British ship called the Thomas Fielden, did refuse on request to deliver up such certificate to the said Thomas Smith Henzell, he being entitled to the custody thereof, for the lawful navigation of the said ship, contrary to The Merchant Shipping Act, 1854.

On the 9th of November instant, the before-mentioned parties appeared before the justices, when the following evidence was adduced.

*829] *Thomas Smith Henzell, on his oath, said: "I am owner of 40-64th shares of the barque Thomas Fielden. Arkle was the captain of the ship, and owner of 8-64th shares, on the 29th of October, when I demanded the certificate of registry from him for the purposes of the lawful navigation of the ship. He did not give it up to me. I am the ship's husband, and managing owner, and have been so ever since I became an owner, and before Arkle became an owner; and have continued to act as such down to the present time, and continued to do so with the knowledge of Arkle, who always acted under my directions, and corresponded with me as such. I originally held 16-64th shares: and, about February or March of this year, I sold 8-64th shares to Arkle. After the ship sailed, viz. the latter part of April, or thereabouts, I purchased 32-64th shares in the said ship, which were transferred to me, but were not endorsed on the certificate of registry on account of the ship's absence: but it was recorded at the custom-house. On the 29th, when I last demanded the certificate of registry, Arkle was fully aware that I held 40-64th shares in the ship, it having been proved

in court, in his presence, on the Monday previous. I wanted to appoint a new captain at the time I demanded the certificate of registry. The ship was in the harbour at that time, and is so still. I have, since the 29th, appointed a new captain, viz. on Friday last." Cross-examined by the counsel for Arkle: "I don't know whether Arkle or the new captain has been on board since Friday. I may have made a mistake as to the date when I purchased the 32-64th shares. When Arkle purchased the 8-64th shares, he then became captain; but he gave no more money on that account. I paid for my 32-64th shares at a less rate *than what I sold to Arkle for, two months before this. This [*830 was on account of some dock bills I had to pay. I was master of the ship before. Arkle only paid what I would have sold to anybody else for; and that there was no agreement that he should be a continuous captain. My interest in the ship is fully mortgaged to Mr. Thompson, my father-in-law. I was captain and ship's husband, ship's repairer, and everything, months before Arkle bought. On 29th October, the vessel was not discharged." Re-examined by the attorney for Henzell: "I swear I was owner of 40-64th shares of the ship on the 29th of October."

Stephen Rogers, on his oath, said: "I am first clerk in the long room of the Custom-House, North Shields. I produce the register of shipping for the port of Shields; by which it appears that, on the 29th of October, Thomas Smith Henzell was owner of 40-64th shares of The Thomas Fielden, subject to a mortgage for 1500*l.*, with interest at 7*l.* per cent. Arkle brought the certificate of registry to get the present owners endorsed on it; this was about a week since."

The case then proceeded as follows.

"Upon this evidence, and on the grounds that the said Thomas Smith Henzell was the owner of the majority of shares of the said ship Thomas Fielden, and was also, with the approbation and consent of the said John Manners Arkle, the managing owner and ship's husband of the said ship, and the said ship having arrived at her port of discharge, that the said Thomas Smith Henzell had authority to unship the present captain, and appoint a new one instead, and therefore that he was entitled to the certificate of registry for that purpose, as well as for any other that might be necessary for the purposes *of the lawful [*831 navigation of the said ship: We found that the matter of the said information had been proved, and therefore convicted the said John Manners Arkle of the offence, and adjudged him to pay a penalty of one pound and costs."

Mellish, for the respondent.—The question turns on sect. 50 of The Merchant Shipping Act, 1854 (17. & 18 Vict. c. 104), which enacts that "The certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge, or interest whatsoever which any owner, mortgagee, or other person may have or claim to have on or in the ship described in such certificate; and if any person whatever, whether interested or not in the ship, refuses on request to deliver up such certificate when in his possession or under his control to the person for the time being entitled to the custody thereof for the purposes of such lawful navigation as aforesaid, or to any registrar, officer of the customs, or other person legally entitled to require such delivery, it shall be lawful for any justice,

by warrant under his hand and seal, or for any Court capable of taking cognisance of such matter, to cause the person so refusing to appear before him and to be examined touching such refusal; and unless it is proved to the satisfaction of such justice or Court that there was reasonable cause for such refusal, the offender shall incur a penalty not exceeding 100*l.*; but if it is made to appear to such justice or Court that the certificate is lost, the party complained of shall be discharged, and such justice or Court shall thereupon certify that the certificate of registry *832] is lost." As against the appellant, the *respondent was "the person for the time being entitled to the custody" of the certificate "for the purposes of such lawful navigation." He is the owner of the majority of the shares, and entitled to preside over the navigation, being, with the consent of the appellant, managing owner and ship's husband, and the appellant always acting under his directions. [Lord CAMPBELL, C. J.—The question seems to be, whether there was "reasonable cause" for the appellant's refusal.] Such cause could be constituted only by the fact that the appellant was master of the ship, or by the fact that he was owner of a certain number of shares. It may be said that the master ought to retain the certificate till he is dismissed. The certificate used sometimes to be deposited upon a loan of money; for, though it gave no legal or equitable title to the ship, the want of it would interpose difficulties in the way of the navigation which might make it necessary for the borrower of the money to obtain it back. It seems to have been the object of sect. 50 to put a stop to this, by authorizing the party entitled to the custody of the certificate for the purpose of the navigation to demand the certificate. The registered owners are often mortgagees or trustees; but the section looks to the person whose servant the master is: such person, for the purpose of the navigation, is the owner of the ship. The enactments respecting the certificate begin with sect. 44, which enumerates the particulars to be comprised in it. There is to be, by sect. 45, an endorsement, on the certificate, of change of owners; and, by sect. 46, of change of master. Sects. 47, 48, contain provisions for the granting of new certificates and for steps to be taken on the loss of a certificate, and for the grant of a *833] provisional certificate if the loss *occur out of the United Kingdom, or a port in a British possession wherein the ship is registered. Then sect. 49 requires the master, within ten days of arrival at a port of discharge in the United Kingdom, or such port in a British possession, to deliver up such certificate; and a new one is to be granted: and perhaps an argument in favour of the respondent may be suggested by this section, which appears to assume that the certificate is to be regularly in the hands of the master. But in sect. 52 "the master or owner" is spoken of as a person who may offend by an improper use of the certificate. It is true that the master cannot sail without the certificate. But he is the servant of the owner, who may choose that he shall not sail, or may intend to appoint another master. [Lord CAMPBELL, C. J.—While the relation of master and owner continues, there are many things to be done by the master for which the certificate may be wanted. CROMPTON, J.—Can one part owner dismiss the master without the assent of the other?] The case here finds that the respondent had the management of the ship. By the English law, though it is otherwise in some other countries, the majority of owners in point of

interest may act against the will of the minority: Abbott On Shipping, Part 1, ch. 3, s. 2, &c. The minority may, if necessary, secure their interests by proceeding in the Admiralty Court. By sect. 50 the certificate is not to be detained by reason of any title, charge, &c., of owners, mortgagees, &c. [Lord CAMPBELL, C. J.—Does not that look as if “navigation” meant the actual sailing?] It might be important, when it is intended to dismiss the master, not to communicate this to him till he had done certain acts, as discharging the cargo. [COLERIDGE, J.—Would a person be liable to the *penalty who refused [*834 to deliver up, on an erroneous but bonâ fide belief that he was entitled to retain?] If the respondent had the right to claim the certificate, it would be a question for the magistrates whether there was a reasonable cause for the refusal. [COLERIDGE, J.—Suppose the ship were going to sail the next day, and the master were not informed why the certificate was required.] The master might refuse to sail without the certificate. [COLERIDGE, J.—If he were told that he was to be displaced, it might be another matter: but, if not, is there not a reasonable cause for the refusal though the right be in the owners?] A reasonable cause would be, for instance, that the certificate was at the bottom of the chest, where it could not readily be got at; or that there had been a change of owners, and the master wanted the certificate for the purpose of endorsement.

W. Digby Seymour, contra, was not called upon.

Lord CAMPBELL, C. J.—I am of opinion that this conviction cannot be supported. The appellant was appointed master, and remained so at the time when the demand was made. No reason was assigned for requiring him to deliver up the certificate. I think that, under those circumstances, there was a reasonable cause for his refusing to deliver it up, namely, that he was master of the ship. No intimation was given to him that it was intended to dismiss him and appoint another master. There has been no violation of the Act. If the owner had said to the master, “I dismiss you and require you to give up the certificate,” and then the master had refused to deliver up, he would have incurred the penalty; and so he would if any good reason had been assigned to him for delivering up the certificate, *and he had refused. But to [*835 refuse upon a mere arbitrary demand, unaccompanied by the assignment of any reason, seems to me not an offence within the Act. The master is the proper person to have the custody of the certificate while he remains master and has no intimation of any intention to change the master.

COLERIDGE, J.—I am of the same opinion. It is clear that the penalty cannot attach if there be a reasonable cause for refusal. It is plain to me that the master might, on good ground both of law and fact, consider himself entitled to detain the certificate. It is clear that he would be so during the actual voyage, taking “navigation” in its most narrow sense. In this instance the ship was in port, but not discharged; and the master was for many purposes the proper person to keep the certificate. In this state of things the owner comes to him, and, without assigning any reason for demanding the certificate, stands on his bare right of ownership. That is not a sufficient title to negative reasonable cause for refusal on the part of the master.

WIGHTMAN, J.—I am entirely of the same opinion. The master is to

hold the certificate, but is liable to a penalty if he refuses to deliver it up to the person entitled to the custody for the purpose of navigation, unless he has reasonable cause for refusal. That is without reference to the ownership. The owner here wanted to change the master, but did not intimate this to the appellant. The appellant is liable to the penalty mentioned at the latter part of sect. 50, unless it be proved to the satisfaction of the justices that he had reasonable cause for refusing *836] to deliver up. The mere fact that the party *demanding the certificate was owner of the ship does not prevent the party holding it from having reasonable cause for refusing to deliver it up: any person requiring it for the purpose of the navigation might detain it.

CROMPTON, J.—I am of the same opinion. It is only necessary to say that, as between one part owner and another, even where the one has also the authority of the ship's husband, if he has not intimated to that other, who is master, any intention to dismiss him, the demand of the certificate is not enough. We need say no more than that; and I wish to give no further opinion on sect. 50. Conviction quashed.

The NORTH STAFFORDSHIRE Railway Company, Appellants, v. DALE and Others, Respondents. Jan. 20.

Under sect. 46 of The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), a railway company, having carried a road over the railway by a bridge, is bound to keep both bridge and road, and all the approaches thereto, in repair; and such repair includes not only the structure of the bridge and the approaches, but the metalling of the road on both.

THIS was a special case, stated by consent of parties and the order of a Judge, under stat. 12 & 13 Vict. c. 45, s. 11, after notice of appeal, to the Staffordshire Quarter Sessions, against an order and adjudication under the hands and seals of two justices of Staffordshire, bearing date 30th April, 1857, whereby The North Staffordshire Railway Company were ordered to put the immediate approaches to a certain bridge, situate in the parish of Leek in Staffordshire, and carrying the turnpike road or public highway leading from Leek to Newcastle under Lyne over the *837] Churnet Valley Branch of the North *Staffordshire Railway, into complete repair within fourteen days; and also to pay to Thomas Dale, the surveyor of roads within the limits of The Leek Improvement Act, 1855, (a) certain costs: and against a conviction under the hands and seals of the same justices, dated 27th May, 1857, whereby the said justices adjudged and ordered that the said North Staffordshire Railway Company should, for having failed for four days to comply with the above-mentioned order, and to pay to T. Dale the said costs, forfeit and pay the sum of 20l.; and also adjudged the said North Staffordshire Railway Company to pay to T. Dale the sum of 1l. 6s. 6d. for his costs.

The order and conviction above mentioned were made under the following circumstances.

The North Staffordshire Railway Company, under the powers of two

(a) 18 & 19 Vict. c. cxxxii., local and personal, public: "For the improvement of the town of Leek, in the county of Stafford, for purchasing the market tolls, and for providing more commodious markets and cemeteries, and for better supplying the inhabitants with water; and for other purposes."

special Acts, viz., The North Staffordshire Railway (Pottery Line) Act, 1846,^(a) and the North Staffordshire Railway Act, 1847,^(b) with which was incorporated The Companies Clauses Consolidation Act, 1845,^(c) formed several railways, which, in the course of their line, crossed various public roads; and some of *these roads were, under the powers of The Railways Clauses Consolidation Act, 1845, carried [*838 over, and some under, the railway.

The road, in respect of which the above-mentioned order and conviction and notice of appeal were made and given, is part of the turnpike road from Newcastle under Lyne to Leek: and, prior to the construction of the North Staffordshire Railway, the whole was repairable and repaired by the trustees of such road. On making the Churnet Valley Branch of the said railway, which crossed the road, it was found necessary for the railway Company, in the exercise of its powers, to raise part of the said turnpike road for the purpose of carrying it over the said line of railway: and the said road was accordingly raised and carried over the railway by means of a bridge of the height and width, and with the ascent, by law provided. The said bridge is a bridge of the description called and known as a Sandwich Girder Bridge. It is constructed by means of two brick abutments on each side the line of railway, upon which are laid flat bars or pieces of iron, each bar being secured between two beams of wood set on edge. Upon this is laid a plank flooring; and on such flooring is placed the ballast and metalling of the road. The ascent or slopes, by means of which the road was raised to the level of, and connected with, the bridge, was formed by and composed of earth-work, and was made with proper embankments and fences; such bridge, earth-work, and embankments, and the works connected therewith, being executed at the expense of the Company. The depth of the earth-work and embankment, measuring from the surface of the former road to the bridge, being fourteen feet, and the ascent from the *commencement of the embankment on the east [*839 side of the bridge being one in twenty-one; the former road on the east side of the bridge descended to where the bridge is built one in fifteen; and from thence towards the west side of the bridge the road was nearly level.

The Company also properly formed and put the road over the bridge, and the slopes, into a fit state for use: and it was duly restored to as good a condition as the same was in at the time when it was first interfered with by the Company, or as near thereto as the circumstances admitted.

The raising of the road made no material difference in its length; the length of the road, since the erection of the bridge and slopes, from the commencement or foot of the slope or ascent on one end of the bridge to the termination of the descent on the other, being one hundred and sixty-nine yards; and the length of the same road, between the same

(a) 9 & 10 Vict. c. lxxxv., local and personal, public: "For making a railway from the Manchester and Birmingham Railway at Macclesfield to the Trent Valley Railway at Colwich, with branches."

(b) 10 & 11 Vict. c. cviii., local and personal, public: "To consolidate and amend the Acts relating to The North Staffordshire Railway Company, and to authorize certain alterations of and the formation of certain branches and additional works in connection with their undertaking."

(c) 2 & 3 Vict. c. 16.

points, before it was raised having been one hundred and sixty-eight yards. The road so restored was used by the public as before it was interfered with.

On the passing of The Leek Improvement Act, 1855, this portion of the turnpike road ceased to be under the control of the turnpike trustees, and became and now is within the limits of the said Leek Improvement Act.

A notice, dated 9th April, 1857, from Thomas Dale, town surveyor to, and on behalf of, the Commissioners under that Act, was served on the railway Company, requiring the Company to put the above-mentioned bridge, and the approaches, road, and works executed by the Company in, upon, and about the said bridge and approaches, and all other necessary works connected therewith, into complete repair within *840] ten days from the service of such notice. After the expiration of ten days from the service of the notice, a summons was issued under the hand and seal of a justice of Staffordshire, bearing date 27th April, 1857, reciting that information and complaint had been that day made before the said justice by the said T. Dale, and reciting the above-mentioned notice, and requiring The North Staffordshire Railway Company to appear at the time and place therein mentioned to answer to the said information and complaint.

On the return and hearing of this summons, on 30th April, 1857, it was proved, and the fact was, that the structure of the bridge and the earth-work embankments and fences of the slopes were in sufficient repair; but that the roadway over the bridge, and upon and along the said earth-work, embankment, and slopes, by reason of the ordinary wear and tear by the public traffic over and along the same, required to be remetalled and repaired throughout the entire length of the slopes. And thereupon the justices made the above-mentioned order of 30th April, 1857.

This order was not complied with by the railway Company: and the conviction of 27th May, 1857, was made after a summons duly served on the railway Company, who thereupon gave due notice of appeal against the said order and conviction as above mentioned.

The question for the opinion of this Court is: Whether, under the above circumstances, The North Staffordshire Railway Company, the appellants, is by law liable to maintain in repair the whole of the said road, or any and what part thereof.

If the Court shall be of opinion that the Company is by law liable to *841] maintain in repair the whole of the said road, then the order and conviction are to be affirmed. If the Court shall be of opinion that the Company is not by law liable to maintain in repair the whole of the said road, then the said order and conviction are to be quashed. If the Court shall be of opinion that the said Company is by law liable to maintain in repair so much only of the said road as lies and passes over and upon the said bridge, then the said order and conviction are to be quashed, but without costs. If the Court shall be of opinion that the said Company is by law liable to maintain in repair so much only of the said road as lies and passes upon and along the said earth-work, embankments, and slopes, then the said order and conviction are to be confirmed, but without costs. (Judgment in conformity with the decision of the Court to be entered at Sessions.)

Bovill, for the respondent.—The Company have been convicted under sect. 46 of The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), which enacts that, “If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the Company.” This includes the duty of keeping the road in a state fit for use: the provisions of the section would manifestly not have been complied with by merely *constructing the brickwork, iron [*842 girders, and planks to support the road; that would not have been making the bridge. Now no distinction appears in the section between the repairing and making of the road and the repairing and making of the bridge. It is indeed a recognised principle of law that, when a party is entitled or bound to make a bridge, he is bound to restore and maintain the approaches to it, if they are part of a public highway: *Rex v. Kerrison*, 3 M. & S. 526 (E. C. L. R. vol. 30); *Regina v. Isle of Ely*, 15 Q. B. 827 (E. C. L. R. vol. 69); *Rex v. Kent*, 13 East 220; *Rex v. Lindsey*, 14 East 317. But it is not necessary to discuss this: because, under sect. 46, the Company are bound to make the bridge and road, and are bound to repair what they are bound to make. Then, as to the approaches: by the Statute of Bridges, 22 H. 8, c. 5, s. 9, whoever is bound to repair a bridge is bound to repair the approaches for three hundred feet on each side. This is not confined to county bridges, and is, indeed, merely in affirmance of the common law: *Rex v. West Riding of Yorkshire*, 7 East 588.(a) At any rate “the immediate approaches,” in sect. 46, comprehend the road so far as its level is changed for the purpose of carrying it over the bridge.

Sir *H. S. Keating*, Solicitor-General, contra.—The question, it is true, mainly turns on sect. 46 of The Railways Clauses Consolidation Act, 1845. But, on looking at other sections, it will be found that the roads and the bridges are spoken of as distinct. It is to be observed that sect. 21 of the General Highway Act, 5 & 6 W. 4, c. 50, enacts: “That if any bridge shall hereafter be built, which bridge shall be liable by law *to be repaired by and at the expense of any county or [*843 part of any county, then and in such case all highways leading to, passing over, and next adjoining to such bridge shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike-road, who were by law, before the erection of the said bridge, bound to repair the said highways.” If therefore there be, as seems to be suggested in the argument on the other side, an analogy between the position of the Company here and that of a county in general, as to bridges, the liability to repair the road remains with those who were bound to repair it before the bridge existed. The bridge is one thing; the road, leading to and passing over it, another. That distinction appears to have been preserved in The Railways Clauses Consolidation Act, 1845. Sect. 46 prescribes the “height and width”

(a) Affirmed on error, in Dom. Proc.; *West Riding of Yorkshire v. The King*, 5 Taun. 284 (E. C. L. R. vol. 1).

of the bridge, words not applicable to the road: nor do the words "such bridge, with the immediate approaches, and all other necessary works connected therewith," include the road which passes over such bridge and approaches. And, though the section enacts that the road shall be carried over the railway, or the railway over the road, by a bridge, it omits the word "road" when the execution and maintenance of the works are provided for. The same distinction appears in sects. 49, 50, 51, 52. Sects. 53 and 54 do make it incumbent on the Company, in the particular cases there provided for, to construct roads; and there roads are expressly introduced into the enactment. There can be no conviction, in the present case, under sect. 54, which imposes a penalty only for interfering with an existing road before another is made. Sect. 65, which *844] gives jurisdiction to the justices, does not mention roads. [Lord CAMPBELL, C. J.—But do you not mean to ask for an opinion on the general question?] That is so: and therefore the objection to the particular form of proceeding is not pressed. The section applicable to the present case is the 56th, which enacts: "If the road so interfered with can be restored compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time when the same was first interfered with by the Company, or as near thereto as may be; and if such road cannot be restored compatibly with the formation and use of the railway, the Company shall cause a new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow; and the former road shall be restored, or the substituted road put into such condition as aforesaid, as the case may be, within the following periods after the first operation on the former road shall have been commenced," &c. That limits the duty of the Company as to roads in a case like the present; and it applies to all roads with which the Company interferes: whereas, if their duty as to roads is to be collected from sect. 46, by supposing the maintenance of the road to be comprehended in the maintenance of the bridge, there is no obligation upon the Company as to roads passing under a railway bridge: but it is improbable that the Legislature can have intended to distinguish as to roads passing over a railway bridge and roads passing under. [Lord CAMPBELL, C. J.—Could you not say a bridge was in bad repair though all its arches and brick or stone work were sound?] That might cer- *845] tainly be said in a popular sense, whether the liabilities were distinct or not. [WIGHTMAN, J.—What are "immediate approaches?"] The main structure of the work over which the road is carried: they do not include the metalling.

Bovill was not called upon to reply.

Lord CAMPBELL, C. J.—It is clear that sect. 46 creates the obligation for which the respondent contends. It provides for each of the two cases, the road being carried over the railway, and the railway being carried over the road: there is to be a bridge in each case: "and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company." I cannot imagine language more conclusively creating an obligation. What is to be done in the first instance? It is said that the Act distinguishes between the structure

and the superstructure. But clearly the obligation which it imposes is not discharged by merely putting arches. The work must be complete, so as to be fit for the passage of carriages. Till then, the Act is not complied with. But, when constructed, it is to be maintained: and the road, as well as the substructure, was to be made. Then, does this apply to the approaches, and to all necessary works to be added thereto? The Solicitor-General appears to admit that it would, but for the inference suggested by sect. 56. But that section does not apply to a bridge, but to a road where there is no bridge. I therefore find nothing to interfere with the clear construction of sect. 46. There is no inconvenience: on the contrary, the inconvenience would be the other way if different bodies had to maintain the bridge and the road. It is much *more convenient that the maintenance of the fabric and of the road [*846 over it should be in the same hands.

(COLERIDGE, J., had left the Court.)

WIGHTMAN, J.—It is contended that, under sect. 46, the bridge means such portion only of the work as excludes the road which is to be carried over the bridge. It seems to me that this is not so: I think it comprehends all necessary to make the work fit to be passed over. If, as the Solicitor-General appears to admit, sect. 46, taken by itself, would include the bridge and the road on it, then, so far as that section goes, the road over it and the approaches, including the road over them, are to be maintained by the Company. It is clear that the section could not be limited to merely building the bridge and constructing approaches, and maintaining only such building and construction. But he argues that from other sections it appears that the obligation of the Company is satisfied by merely building the bridge and constructing the earth-work of the approaches, and maintaining so much, so as to enable other parties to put the materials of road over this, and especially that sect. 56 limits the duty of the Company to putting the road into the state in which it was before they interfered with it. But it is quite clear that this section is inapplicable to the case where a road passes over a bridge made by the Company: the road over that is a road different from the road they have interfered with. I think therefore that the Company are liable to the obligation for which the respondent contends.

CROMPTON, J.—I am of the same opinion, and for the same reasons.

Judgment for respondent.

*POTTS, Appellant, v. CUMBRIDGE, Respondent. Jan. 20. [*847

A single woman, having been delivered of a bastard child, applied, within twelve months of the birth, to a justice for a summons upon the putative father. She (not being on oath) stated that she had learned that the putative father was in America; upon which the justice, without directly refusing the application, declined to issue the summons then. More than twelve months from the application, she discovered that the putative father was in England; upon which she obtained and served a summons from the same justice; and the justices, upon this application, made an order of maintenance upon him. The summons professed to be on a "renewed" application.

Held that the order was good, under stat. 7 & 8 Vict. c. 101, s. 2, and stat. 8 & 9 Vict. c. 10, sched. No. 4; the whole preceeding being in effect founded on the original application, and it not being necessary that the summons should issue at the time when the application is made.

THIS was a case stated, by three justices of Huntingdonshire, for the opinion of this Court, under stat. 20 & 21 Vict. c. 43.

At a petty Session for Huntingdonshire, holden in and for the division of Hurstingstone in the said county, at Ramsey, on 30th April, 1856, Catherine Cumbridge, single woman, residing at Wistow within the said division, made an application, to a justice of the peace acting for the said division, for a summons to be served upon Henry Potts, then late of Ramsey in the said county, whom she alleged to be the father of a bastard child of which she had been delivered on the 22d March, 1856.

The said application was according to the form No. 3 in the schedule to the Act (8 & 9 Vict. c. 10), "To make certain provisions for proceedings in bastardy," but was not upon oath; nor does the Act require such an application to be on oath. No summons was then issued pursuant to the said application, in consequence of C. Cumbridge then informing the said justice that the said H. Potts had left Ramsey near two months, and she could not learn from his friends or others where he had *848] gone; his mother telling her he had gone to America: and she was told by the magistrate to apply to the Bench for a summons for the said H. Potts, to answer her said complaint and application, as soon as she could ascertain where he was living.

At a petty sessions holden in and for the said division on 30th November, 1857, at Saint Ives, within the said division and county, the said complainant C. Cumbridge having a few days then previously ascertained that the said H. Potts was working at his trade at Cambridge, she applied for a summons to issue upon her application so made on 30th April, 1856; and the said justice issued his summons accordingly, taking no fresh information from the said complainant. The following is a copy of such summons.

"County of Huntingdon, } To Henry Potts, late of the parish of Ram-
Hurstingstone Division. } sey in the said county, carpenter.

"Whereas application was, on the 30th of April, 1856, made to me, the undersigned, one of Her Majesty's justices of the peace for the said county, by Catherine Cumbridge, single woman, residing at Wistow, in the petty sessional division of the said county for which I act, who hath been delivered of a bastard child since the passing of the Act of the eighth year of the reign of Her present Majesty intituled 'An Act for the further amendment of the laws relating to the poor in England,' within twelve calendar months from the date of such application, and of which bastard child she alleges you to be the father, for a summons to be served upon you to appear at a petty sessions of the peace, according to the form of the statute in such case made and provided: and *849] whereas the said Catherine Cumbridge hath renewed *her application this day for a summons for you to answer such her complaint: These are therefore to require you to appear at the petty session of the justices holden at Saint Ives, being the petty session for the division of Hurstingstone aforesaid in which I usually act, on Monday the 14th day of December next, at 11 o'clock in the forenoon, in the year of our Lord 1857, to answer any complaint which she shall then and there make against you touching the premises. Herein fail not." (Signed and sealed by the justice: dated 30th November, 1857.)

"Note," &c. (in the form of No. 4 of the Schedule).

At a petty sessions holden in and for the said division at Saint Ives

aforesaid, on 14th December, 1857, the said complainant, and defendant and his attorney, appeared; and the complainant was, in the defendant's presence, sworn to the truth of the said information and application made on 30th April, 1856. The complainant, on her oath, stated that she had known the defendant many years, and that he resided at Ramsey aforesaid, until about two months previous to the 22d March, 1856, on which day she was delivered of a bastard child, of which he was the father; and that he left Ramsey about two months before her delivery: and, from diligent inquiries she had frequently made from time to time, from his leaving, she could not and did not ascertain where he was gone, but was told by his mother he had gone to America. That, about a fortnight before the said 30th November, 1857, she heard that he was then residing at Cambridge: and, in consequence of such information, she on that day applied for the summons dated and issued on that day. It appeared that the said summons was duly served on the defendant at Cambridge. *No evidence was given to prove that the defendant [*850 had any residence at Cambridge, or to prove where he had resided at any time since he left Ramsey: but his attorney alleged that the defendant left Ramsey to go to reside at Cambridge, where he had resided ever since.

No evidence was given by or on behalf of the defendant.

The complainant admitted, in her evidence, that the defendant had not, within twelve calendar months next after the birth of the child, or since, paid her any money for its maintenance.

It was objected by the defendant's attorney that no valid order could be made upon the said information of 30th April, 1856, and the summons of 30th November, 1857: he alleging that no summons had been issued upon that information, and that the summons which was issued on 30th November, 1857, was issued upon an application made after twelve calendar months next after the birth of the child; and that such application ought to have been according to the form No. 5 in the Schedule to the said Act; and that proof ought to have been given that the defendant had paid money for the maintenance of the child within a year after its birth.

The case proceeded as follows.

"We determined that the complainant had made a proper application within twelve calendar months after the birth of the child, (namely) on the 30th of April, 1856, and in the proper form; and that the issuing of a summons would have been useless; complainant being told defendant had left the country, and consequently we could not infer a summons, if then issued, would reach him if left at his former place of abode, Ramsey (which he had left near two months); so that we could proceed to *hear and determine her complaint in his absence if he did not [*851 then appear to such summons had it issued: and we held such application, and the summons issued thereon on the 30th of November, 1857, to be valid, and made our order on defendant for maintenance of complainant's child from its birth, with payment of costs: and the following is a copy of such order.

"At a petty session of Her Majesty's justices of the peace for the county of Huntingdon, holden in and for the division of Hurstingstone in the said county, at Saint Ives, on the 14th day of December in the

year of our Lord 1857, before us,' &c. (three names), 'three of Her Majesty's justices of the peace for the said county:—

" 'County of Huntingdon, } Whereas one Catherine Cum-
 Division of Hurstingstone, to wit. } bridge, single woman, residing
 at Wistow within this division, did, on the 30th day of April in the year
 of our Lord 1856, having been delivered of a bastard child within twelve
 calendar months prior thereto, make application to,' &c., 'one of Her
 Majesty's justices of the peace acting for this division, for a summons to
 be served upon one Henry Potts, then late of Ramsey in the said county,
 but now of the town of Cambridge, carpenter, whom she alleged to be
 the father of the said child: and whereas the said Henry Potts, at the
 time of such application being made, had absconded from Ramsey, and
 his abode was unknown to the complainant, the said Catherine Cum-
 bridge: and whereas the said Henry Potts, having been duly served with
 a summons within forty days from this day, and now appearing in pur-
 suance thereof, and the said Catherine Cumbridge having now applied to
 us, the justices in petty sessions assembled, for an order upon the said
 *852] *Henry Potts according to the form of the statute in such case
 made and provided: and it being now proved to us, in the presence
 and hearing of the said Henry Potts, that the said child was, since the
 passing of an Act passed in the eighth,' &c., 'that is to say on the 22d
 day of March in the year of our Lord 1856, born a bastard of the body
 of the said Catherine Cumbridge: and we, having, in the presence and
 hearing of the said Henry Potts, heard the evidence of such woman, and
 such other evidence as she hath produced, and having also heard all the
 evidence tendered by and on behalf of the said Henry Potts; and the
 evidence of the said Catherine Cumbridge, the mother of the said child,
 having been corroborated in some material particular by other testimony
 to our satisfaction; do hereby adjudge the said Henry Potts to be the
 putative father of the said bastard child; and, having regard to all the
 circumstances of the case, we do now hereby order that the said Henry
 Potts do pay,' &c.

(Signed and sealed by the three justices.)

"The opinion of the Court of Queen's Bench is asked: Whether, under the facts and circumstances hereinbefore set forth, our said determination is correct in point of law, and whether our said order is a valid and legal order."

No one appeared on behalf of the respondent.

Tozer, for the appellant.—The summons was too late. According to the form, No. 4, in the Schedule to stat. 8 & 9 Vict. c. 10, the summons should recite that application had been made "this day," and that the applicant had been delivered "within twelve calendar months from the *853] date hereof." From this it is clear *that the Legislature intended the summons to issue immediately upon the application. And, by sect. 2 of stat. 7 & 8 Vict. c. 101, the time for the application is limited to twelve months from the birth; and the justice is "thereupon" to issue the summons. The service at the last place of abode would have been enough; *Regina v. Higham*, 7 E. & B. 557 (E. C. L. R. vol. 90): (a) and this furnishes an answer to any difficulty which may be suggested from the fact that the abode of the appellant was not known. [CROMPTON.

(a) See *Regina v. Lightfoot*, 6 E. & B. 822 (E. C. L. R. vol. 88).

J.—According to your argument, if the application be made on the last day of the twelve months, and the justice takes till next day to consider, the summons cannot be issued.] The summons, at the very least, should be issued in reasonable time from the application. Even supposing that the appellant really had gone to America, the justices might have made an order and have enforced it on his return. Or they might have adjourned the hearing under sect. 4 of stat. 7 & 8 Vict. c. 101. But it was not proved upon oath that he had gone to America in fact. Within the twelve months, the woman may renew the application as often as she pleases. The delay may prejudice the case of the alleged putative father: his evidence may be lost.

LORD CAMPBELL, C. J.—I am of opinion that the proceedings have been perfectly regular. The mother makes the application, in due time, on 30th April, 1856; she does not discover the residence of the putative father till just before the 30th of November, 1857. Just before she makes her first application, she goes to the mother of the putative father for information, and is told that he is *gone to America. The application on 30th April, 1856, was perfectly regular: it was [*854 not on oath; but it is not required to be on oath. The second application was, in effect, a continuation of the first. It is suggested that there is a hardship upon the appellant: but this, I must say, I do not understand. It is only because the putative father has absconded that he is not summoned earlier.

COLERIDGE, J.—I am of the same opinion. The application is to be made in twelve months from the birth of the child; and thereupon a summons is to issue. If Mr. *Tozer* is right, this means that the summons must issue immediately on the application. But I think that is not so. There is no positive refusal of a summons; nothing to drive the respondent to make a fresh application: only the summons does not issue upon the first application because of the information that the appellant has gone to America. Mr. *Tozer* urges that there is no legal proof of this. I do not think that material: but we have a right to look at what passes before the magistrate. It is pretty clear that the appellant admitted the truth of the alleged ground upon which the summons was issued. We come therefore to the question, whether it is necessary that a summons should be issued, when it will be merely useless and illusory, in order that there may be an adjournment from time to time; and whether the want of this is matter of substance so as to affect the validity of the proceedings. I think the magistrates would have been wrong in so holding. As to the suggestion, that a fresh application may be made, that would have been too late in this case.

*WIGHTMAN, J.—I am of the same opinion. The only regulation as to the time is that the application must be made in twelve [*855 months, unless it can be said that it is necessary “thereupon” to issue the summons; that is, immediately on the application. I think it is not.

CROMPTON, J.—I am of the same opinion, as far as I can collect the facts and the effect of the Act. There is a restriction of twelve months, as to the application; and that restriction I should not feel inclined to extend. It is often said that a case of cruelty arises if the putative father keeps out of the way till the end of the twelve months. The only question here is whether this proceeding can be said to be founded on the original application. I will not say that it could, if the summons

had been refused on the first application: but here I cannot say that it is not so founded. The first application is *bonâ fide* acted upon, after the lapse of a certain time. I find nothing requiring that the summons should be issued at the time of the application.

Judgment for respondent.

***856] *Ex parte The Overseers of DOWNTON. Jan. 22.**

The Court will not grant a mandamus requiring parish officers to receive a pauper in obedience to an order of removal. The proper course is by indictment.

J. GRAY moved for a rule calling upon The Overseers of the parish of Plateford, in Wiltshire, to show cause why a mandamus should not issue commanding them to receive a pauper, for the removal of whom, to that parish, from the parish of Downton, Wiltshire, two justices had made an order. [Lord CAMPBELL, C. J.—The ordinary course, in case of the disobedience of such an order, is by indictment: you do not want a specific remedy: it is simply a case of not obeying an order of Sessions.] The present overseers may be out of office before the indictment can be tried.

Lord CAMPBELL, C. J.—We should be introducing a novelty if we were to grant this rule.

(COLERIDGE and WIGHTMAN, Js., were absent.)

CROMPTON, J., concurred.

Rule refused.(a)

(a) Sect. 18 of stat. 12 & 13 Vict. c. 45, applies to orders "made by any Court of General or Quarter Sessions." Orders of Petty Sessions are not mentioned.

***857] *LEE and BAKER, Assignees of STEPHEN WILES, a Bankrupt, v. ROWLEY. Jan. 22.**

Where, under sect. 223 of The Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), the Bankruptcy Commissioner adjudicates a trader, who has petitioned under sect. 211, to be a bankrupt, he must state in the order of adjudication the facts giving him jurisdiction so to do under sect. 223: otherwise the order of adjudication is void.

Per Crompton, J.—If the validity of the bankruptcy is in issue, such facts, though so found in the order, may be disputed.

THIS was an action brought by the plaintiffs, as assignees of Stephen Wiles, who, before and up to the time of his alleged bankruptcy after mentioned, carried on the business of a brewer at St. Neots in the county of Huntingdon, against defendant, who, in 1854, was sheriff of that county, in respect of the seizure and sale by defendant, as such sheriff, of certain goods and chattels under colour of a *fi. fa.* against Wiles at the suit of James Rhodes as the registered public officer of The London and County Bank.(a)

On the trial, before Lord Campbell, C. J., at the Middlesex Sittings

(a) The pleadings were not stated in the paper-books, and do not appear to have been further brought before the Court. On the argument it was assumed that the issues raised the points submitted.

after Trinity Term, 1856, it was agreed between the parties that a verdict should be entered for the plaintiffs, subject to the opinion of this Court upon a case, which, so far as regards the point here decided, was substantially as follows.

On 16th March, 1854, Wiles, being then and at all the times after mentioned a trader within the meaning of The Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), was indebted (besides debts to other creditors) to The London and County Banking Company in 155*l*. 5*s*. 3*d*. : and on that day a writ of summons for *the recovery of [*858 this sum issued out of the Court of Exchequer, against Wiles, at the suit of James Rhodes, as the registered public officer of the Company.

On 19th April, 1854, by consent of both parties in the action, a Judge's order was made for payment of the 155*l*. 5*s*. 3*d*., with interest and costs, by two instalments, on 10th June and 10th July, 1854, respectively; with a provision in the said order that, in case default should be made in any payment, the plaintiff should be at liberty to sign final judgment and issue execution for the whole amount unpaid at the time of such default. Such order was made bonâ fide; and a copy thereof was duly filed.

On 7th June, 1854, Wiles, under sect. 211 of The Bankrupt Law Consolidation Act, 1849, presented a petition to the Court of Bankruptcy in the London District (having jurisdiction), setting forth his inability, and praying for protection of his person and property in the form in Schedule A a. The petition was filed in the Court, with an affidavit of Wiles, in the form in the Schedule A b: and, upon the same day, the Court granted protection till 18th July then next; and, according to section 213, the Court appointed a private sitting for the 18th July then next, and appointed the plaintiff Charles Lee official assignee. On 9th June, notice of these proceedings was given to the Company and to Rhodes by the attorney of Wiles.

On 16th June, 1854, default having been made in payment of one of the instalments mentioned in the Judge's order, judgment was signed in the action for 158*l*. 5*s*. 3*d*.; and, on the same day, a fi. fa. was issued upon the judgment, directed to defendant as sheriff of Huntingdonshire, endorsed to levy 158*l*. 5*s*. 3*d*., and 1*l*. 5*s*. *for costs of execution; which was delivered to defendant on the same day: and [*859 he thereupon issued a warrant to his officer to levy. On 17th June the officer proceeded to the premises occupied by Wiles, at St. Neots, for the purpose of levying. Upon his arrival there, and before he commenced to levy, he saw Wiles, who then informed him of the proceedings in the Court of Bankruptcy, and produced, and showed, and handed, to him the said order for protection; and the officer then read the same: but, notwithstanding the order, he seized and took in execution the stock in trade, utensils, and household effects of Wiles on the premises, under colour of the said writ and warrant. On the morning of 19th June, defendant, having received an indemnity from the Company, executed to Rhodes a bill of sale of a great portion of the goods.

At a later time of the same 19th June the Court of Bankruptcy made an order, directing that the estate and effects of Wiles should be taken possession of by the messenger: and, on the afternoon of the same day, the messenger did accordingly claim to take, and did all in his power

to take, such possession, but did not, and could not, obtain such possession.

On 21st June, the Court of Bankruptcy, upon the application of Thomas and John Eldgood, partners, to whom Wiles was, and ever since the previous month of April had been, indebted in 63*l.*, and upon reading the depositions of Thomas Eldgood and Thomas James Rooke (the attorney of Messrs. Eldgood), and a copy of the Judge's order, adjudicated Wiles a bankrupt, and ordered that the adjudication should be forthwith advertised, and appointed two sittings in the Court as in bankruptcy.

*860] *Rooke's affidavit in the Court of Bankruptcy was dated 19th June, 1854, and set forth the proceedings in the action down to and including the signing of judgment.

Thomas Eldgood's affidavit was dated 21st June, 1854, and was as follows.

"Thomas Eldgood, of," &c., "being sworn and examined at the time and place above mentioned, upon his oath saith: That Stephen Wiles, of," &c., "brewer, by whom a petition for arrangement was presented to this Honourable Court on the 7th day of June instant, is justly and truly indebted to this deponent and to John Eldgood, this deponent's copartner in trade, in the sum of 63*l.* for twelve quarters of malt sold and delivered by this deponent and his said copartner to the said Stephen Wiles in the month of April last, and for six quarters of malt sold and delivered by this deponent and his said copartner to the said Stephen Wiles in the month of May last; for which said debt he this deponent, or his said copartner, hath not received any security or satisfaction whatsoever. And this deponent further saith that he has been informed, and he this deponent verily believes, that, within about two months since, the said Stephen Wiles consented to a Judge's order in favour of The London and County Bank, for payment, on the 10th day of June instant, of a debt of 150*l.* and upwards, due from him, the said Stephen Wiles, to the said London and County Bank. That, on Sunday the 18th day of June instant, he, this deponent, saw and conversed with an officer of the sheriff of Huntingdonshire, who was then in possession of the goods and effects of the said Stephen Wiles at St. Neots aforesaid; and who then informed this deponent that he was so in possession under a writ *861] of execution issued at the suit of the said London *and County Bank against the effects of the said Stephen Wiles. That this deponent believes it is the intention of The London and County Bank at once to take a bill of sale from the said sheriff of the said goods and effects; and that, by reason of such execution, it will be impossible for the said Stephen Wiles to carry out any arrangement of his affairs under the said petition. And that this deponent is therefore desirous that the said Stephen Wiles should be forthwith adjudged bankrupt."

The orders of the Court of Bankruptcy were as follows. Each was dated 21st June, 1854.

"Whereas, the said Stephen Wiles, being a trader within the meaning of the statute now in force relating to bankrupts, and being unable to meet his engagements with his creditors, did, on the 7th day of June, instant, present his petition to this Honourable Court, under the provisions of The Bankrupt Law Consolidation Act, 1849: and whereas, upon application this day made to me by Mr. Rooke, the solicitor for Thomas

Eldgood and Eldgood, creditors of the said Stephen Wiles, that he, the said Stephen Wiles, be adjudged bankrupt: Upon reading the depositions of the said Thomas Eldgood and of Thomas James Rooke, and the paper writing thereto annexed: This Court doth adjudge such petitioner, the said Stephen Wiles, a bankrupt, and doth adjourn all further proceedings in the matter into the public court. And this Court doth order and direct that this its adjudication be forthwith advertised; and doth hereby appoint a sitting of the Court to be holden on the 4th day of July next, at twelve of the clock at noon, and the 8th day of August, at one of the clock in the afternoon."

"I, the said Commissioner, upon good proof, upon *oath before me this day taken, do find that the said Stephen Wiles has become bankrupt within the true intent and meaning of the law of bankruptcy. And I do therefore declare and adjudge him bankrupt accordingly." [*862]

On the same 21st of June, the Court appointed the plaintiff, Charles Lee, official assignee: and, on 4th July following, the plaintiff, John Baker, was appointed creditors' assignee, which choice and appointment were ratified and confirmed by the Court.

The defendant contended: 1st. That the adjudication was null and void; 2d. That there was no act of bankruptcy to which the title of the assignees could have relation prior to the said seizure and sale; 3d. That there was no act of bankruptcy of which the said Banking Company had notice prior to the said seizure and sale. And that therefore the plaintiffs were not legally appointed the assignees of the estate and effects of the said Stephen Wiles; and that the defendant was entitled to the verdict upon issues raised upon certain of the pleas.

It was agreed that, if the Court shall be of opinion that the said adjudication was valid, and that the plaintiffs are entitled to recover in respect of such seizure or sale or detention of any of the goods seized under the *fi. fa.*, the verdict shall stand for the plaintiffs.

If the Court shall be of opinion that the adjudication is not valid, or that the plaintiffs are not entitled to recover in respect of such seizure or sale or detention, then a verdict is to be entered for the defendant; and judgment entered accordingly.

The questions for the opinion of the Court are: Whether the said Stephen Wiles was lawfully adjudicated a bankrupt; and, if the Court shall be of opinion that *he was, then Whether the plaintiffs, as assignees, can maintain the present action against the defendant [*863] in respect of the premises.

H. Hawkins, for the plaintiffs.—Under sect. 223 of The Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), the Commissioner had a discretionary power to adjudge Wiles a bankrupt. The enactments relating to the proceedings in the case of a trader unable to meet his engagements commence at sect. 211, which empowers him to petition the Court of Bankruptcy; which may grant him protection. Sect. 212 gives forms; sect. 213 directs the appointment of a private sitting and of an official assignee; sect. 214 directs the filing of an account by the petitioner; sect. 215 prescribes the proof of debts, and the sitting for the confirmation of a proposal assented to by three-fifths of the creditors; sects. 216, 217, regulate the proceedings at the sitting to be so prescribed; sects. 218, 219, provide for the appointment, rights, and duties of the official assignee; sect. 220 provides for a special sitting;

sect. 221 directs the Court to give the petitioner a certificate when the resolution of the creditors shall have been carried into effect, which, except as to certain debts, is to operate as a certificate of conformity under a bankruptcy; and sect. 222 authorizes the granting of a certificate to the official assignee. Then follows sect. 223, upon which this question will turn. By this the Court may adjudge the petitioner a bankrupt for various reasons; among others, if the petitioner's proposal for arrangement is "not reasonable and proper to be executed under the direction of the Court," "or if within three months of the time of *864] *presenting his petition he shall have assigned, transferred, or made away with any portion of his estate or effects otherwise than in due course, or shall have voluntarily done or suffered any act whereby his goods shall have been taken in execution." The affidavit which was before the Commissioner presented a case upon which he might act, under this section: whether he has judged rightly this Court cannot inquire: the whole course of proceeding differs from that which is to take place upon the petition of a creditor. The right of the assignees, it is true, dates only from the adjudication: *Monk v. Sharp*, 2 H. & N. 540.†(a) It is true, too, that sect. 76 allows a creditor, after a petition of the trader has been dismissed, to treat it as an act of bankruptcy, and not before: but that does not apply where the Commissioner himself acts upon the petition being before his Court. [CROMPTON, J.—The Commissioner does not find that any of the cases in sect. 223 have arisen. Should not that be on the face of the order, according to the authority of *Christie v. Unwin*, 11 A. & E. 373 (E. C. L. R. vol. 39)?](b) Certainly there is only the fact of the adjudication.

Lush, contra, was not called upon.

LORD CAMPBELL, C. J.—The Commissioner had, no doubt, jurisdiction if he had found the fact: but we cannot support this order as it stands.

COLERIDGE, J., and WIGHTMAN, J., concurred.

*865] *CROMPTON, J.—I may remark that it seems to have been at one time supposed that *Christie v. Unwin*, 11 A. & E. 373 (E. C. L. R. vol. 39), showed the finding of the facts, on which the adjudication of bankruptcy professes to be founded, not to be disputable; the Court of Exchequer has, however, decided otherwise.(c) It is important that it should be understood that the facts must be proved if the adjudication is questioned.

Judgment for defendants.

(a) See *Nicholson v. Gooch*, 5 E. & B. 999 (E. C. L. R. vol. 35).

(b) See *Gosset v. Howard*, 10 Q. B. 411, 445, 452 (E. C. L. R. vol. 59), in Exch. Ch., reversing the judgment of Q. B. in *Howard v. Gosset*, 10 Q. B. 359.

(c) See *Fletcher v. Manning*, 12 M. & W. 571.†

EDWARD BEARD and WILLIAM BEARD, Plaintiffs, v. CHARLES KNIGHT, Defendant, and GEORGE HEAD, Claimant on a proceeding of interpleader. *Jan. 22.*

If the bailiff seizes, under a warrant of a county court, goods belonging to a stranger, he cannot, under stat. 19 & 20 Vict. c. 108, s. 75, distrain such goods for the rent of the landlord; and, if he does so, the true owner is entitled to have his goods back.

THIS was an appeal from the judgment of the judge of the county court of Sussex, held at Lewes.

The plaintiffs, on 29th September, 1857, obtained judgment against the defendant, in an action then pending in the said county court for 35*l.* for debt, and 4*l.* 14*s.* 2*d.* for costs.

On 5th October, 1857, an execution was issued upon the judgment against the goods and chattels of defendant, for the said debt and costs, and the costs of the execution and levy. By virtue of the said execution, the bailiff of the said county court entered upon the house and premises in the occupation of the defendant, *and seized and took [*866 in execution all the goods and chattels then found there.

Before any sale of the goods and chattels so seized and taken in execution, the landlords of the house and premises occupied by the defendant gave due notice to the bailiff that there were two quarters' rent, amounting together to the sum of 15*l.*, owing by the defendant to them in respect of the said house and premises in the occupation of the defendant. And thereupon the bailiff distrained the same goods and chattels for the amount of the said rent, in pursuance of the stat. 19 & 20 Vict. c. 108, s. 75.

Also, before any sale, the above-named claimant gave due notice to the bailiff that certain of the said goods and chattels, so seized and taken in execution, were his property, and not the property of the defendant: and thereupon an interpleader summons was issued.

Before the interpleader summons was heard, the goods and chattels, seized and taken in execution as aforesaid, including those claimed by the claimant as his property, were sold by the bailiff and produced the gross sum of 54*l.* 1*s.*

Upon the hearing of the interpleader summons, it was proved that such of the goods and chattels seized under the execution as were claimed by the claimant had produced, by the sale thereof, 24*l.* 17*s.* 6*d.*: but it was found and determined by the judge of the said county court that the claimant had proved that a portion only of the said goods and chattels claimed by the claimant, and which had realized, upon the sale thereof by the bailiff, the sum of 14*l.* 7*s.* 6*d.*, were, at the time of levying the said execution, the bonâ fide property of the claimant, and were not, nor had they previously been, *the property of the [*867 defendant. But, inasmuch as the said sum of 54*l.* 1*s.*, the produce of the whole of the goods and chattels seized and sold under the execution and distress, was not sufficient to satisfy the rent due to the landlords of the said defendant and the whole of the debt and costs due to the plaintiffs, the judge dismissed the claim of the said claimant, but without giving costs against him.

The judge held that the said sum of 14*l.* 7*s.* 6*d.*, the proceeds of the sale of such of the said goods as he found to be the property of the

claimant, might be applied in part satisfaction of the said rent; and that the residue of the said rent should be paid out of the proceeds of such of the said goods as were found to be the property of the defendant; and that the remaining part of such proceeds should be applied towards satisfaction of such execution.

The question for the opinion of the Court is: Whether, under the circumstances, the above-named claimant is not entitled, and ought to have paid to him, the produce of the sale of such of the goods and chattels seized and sold under the before-named execution as were found and determined by the judge of the said court to have been the property of the claimant, and not of the above-named defendant.

F. L. Spinks, for the appellant.—Stat. 19 & 20 Vict. c. 108, s. 75, after enacting that stat. 8 Ann. c. 14, s. 1, shall not apply to goods taken into execution under the warrant of a county court, substitutes another remedy for the landlord, who may, within five days of the seizure, claim the rent due: and the bailiff is to distrain for so much *868] rent, besides the costs and the execution debts, and satisfy, first the costs of the sale, next the rent due, not exceeding the rent of a year in any case, nor a less portion where the tenement is held for less than a year: lastly, the amount for which the warrant issued. The question is, whether the claim of the landlord can be satisfied out of a levy upon the goods of a stranger. The claimant under this interpleader insists that the provisions above mentioned refer only to goods lawfully taken, and not to the goods of a stranger. [CROMPTON, J.—Clearly that was so under stat. 8 Ann. c. 14, s. 1.] That view makes all reasonable: the bailiff must take only what he can sell; and he is to apply it only to what is due from the execution-debtor. [CROMPTON, J.—It makes strongly for you that the overplus, if any, is to be returned to the defendant.] That is conclusive: it is impossible that a man should acquire property in the goods seized for his debt when they are the goods of a stranger. [WIGHTMAN, J.—What is the bailiff to do? He finds goods in the possession of the debtor: a claim is made: must he wait for an interpleader?] His seizure is either right or wrong: he must go on at his own peril: the county court judge is to do justice between the parties. (He was then stopped by the Court.)

H. Hawkins, contra.—Sect. 75 of stat. 19 & 20 Vict. c. 108, is quite express. The moment the goods are in the possession of the bailiff, the bailiff is clothed with the rights which an agent of the landlord would have. Now the landlord might have distrained on any goods found in the tenement: the seizure cannot destroy this right. [WIGHTMAN, J.—You say that, if the bailiff has seized the goods of a stranger, and the landlord has put in a claim, the bailiff may seize other goods, belonging *869] to the execution-debtor, and satisfy the landlord out of the first goods.] He may. The direction that the overplus is to be returned to the defendant appears to have been inserted through an oversight. [CROMPTON, J.—The landlord may perhaps insist on his right as between the bailiff and himself: that is owing to the bailiff's wrongful act: but the question here is between the landlord and the true owner.] The owner may have a remedy against the bailiff for the injury sustained. The section is for the protection of the landlord. [CROMPTON, J.—True; in the case of goods properly taken in execution. Lord CAMPBELL, C. J.—There is hardship enough in the law

which allows the landlord to distrain the goods of a stranger: I do not feel disposed to extend that. This is a new statutable power of distress: and the question is whether we are to apply it to the goods of a stranger. CROMPTON, J.—The grievance, to remedy which stat. 8 Ann. c. 14, s. 1, was introduced, was that goods taken in execution were protected from distress.]

LORD CAMPBELL, C. J.—I think the county court judge was clearly wrong.

(COLERIDGE, J., was absent.)

WIGHTMAN, J., and CROMPTON, J., concurred.

Judgment for the claimant in the interpleader.

*The Guardians of the Poor of the parish of BIRMINGHAM
v. WILLIAM BEAUMONT. Jan. 26. [*870]

Under stat. 18 & 19 Vict. c. 105, s. 14, if lunatics whose settlement cannot be ascertained are sent to an asylum from a borough having a separate Court of Quarter Sessions, the borough is liable to the expenses if it does not contribute to the county rate under stat. 5 & 6 W. 4, c. 76, s. 117, and is not liable if it does so contribute. The words of the Act being clear, though there is no apparent reason for the enactment, the Court must enforce it.

THIS was a case stated, without pleadings, with a view to obtain the opinion of this Court whether the liability to repay to the parish of Birmingham the expenses relating to pauper lunatics, sent from the parish to the asylum of the borough of Birmingham, whose settlements cannot be ascertained, rests on the borough of Birmingham or on the county of Warwick. The plaintiffs are a corporation created by a public local and personal Act (1 & 2 W. 4, c. lxvii.(a)); and in them the general management of the poor of the parish of Birmingham is vested by the Act. The defendant is the treasurer of the borough of Birmingham. It was admitted that a pauper lunatic had been found in the parish of Birmingham, and had been duly sent to the asylum for the borough; that her settlement could not be ascertained; and that an order of justices on the defendant, as treasurer, to repay to the plaintiffs, for the parish, the expenses respecting such lunatic, had been duly made and served; and that everything necessary to entitle the plaintiffs to maintain an action for those expenses, under stat. 16 & 17 Vict. c. 97, s. 121, had happened, if the order could be made on the treasurer for the borough. The case then proceeded. The borough of Birmingham is a *borough newly incorporated under stat. 5 & 6 W. 4, c. 76, s. 141, and stat. 7 W. 4 & 1 Vict. c. 78, s. 49. It has a separate [*871 court of quarter sessions and gaol. It contains, besides the parish of Birmingham proper, the parish of Edgbaston and certain hamlets situate in the parish of Aston; and, before the passing of stat. 2 & 3 W. 4, c. 64, the area comprised in it was chargeable with, and contributed to, the county rate of the county of Warwick up to the time of such incorpora-

(a) "For better regulating the poor within the parish of Birmingham, in the county of Warwick; and for empowering the guardians of the poor to grant building leases of certain lands vested in them, or otherwise to sell and dispose of the same, and to apply the moneys to arise therefrom in the enlargement or rebuilding of the present workhouse; and for other purposes."

tion in 1838. The borough of Birmingham has also erected, and keeps and maintains, a lunatic asylum of its own. Under the provisions of stat. 12 & 13 Vict. c. 82, s. 2, it has ceased to contribute, and does not contribute, any sum towards the county rate in respect to the lunatic asylum of the county of Warwick, or the expenses of the pauper lunatics therein, or of gaols, coroners' inquests, and the like; but it does, under the provisions of the 117th section of stat. 5 & 6 W. 4, c. 76, contribute to the county rate in respect to all other sums of money expended out of the county rate for purposes for which boroughs, having coroners, courts of quarter sessions, gaols and lunatic asylums of their own, are liable to contribute under the provisions of that section. It is contended, therefore, by the defendant, on behalf of the borough of Birmingham, that that borough is liable, under stat. 5 & 6 W. 4, c. 76, s. 117, to the payment of a proportion of the sums expended out of the county rate, and therefore the liability to have such an order as this made upon the borough of Birmingham does not exist under the words of stat. 18 & 19 Vict. c. 105, s. 14. On the other hand, it is contended for the plaintiffs, the parish officers, that the 14th section of stat. 18 & 19 Vict. c. 105, is *872] to be read and construed in connection with, and as if it *were found in the place of, the 3d section of stat. 12 & 13 Vict. c. 82, which it repeals and for which it is substituted. And so, reading it in connection with the provisions of the 2d section of stat. 12 & 13 Vict. c. 82, by which the liability of the borough of Birmingham to contribute to the lunatic expenditure of the county is removed, the words in stat. 18 & 19 Vict. c. 105, "not liable" "to the payment of a proportion of the sums expended out of the county rate," must mean a proportion of the sums expended in respect of lunatics: and so, upon that construction, this order is properly made upon the borough of Birmingham, and could not be made upon the county.

It is agreed that the judgment of the Court shall be entered as the Court shall think fit: and, if for the plaintiffs, then for the sum of 24*l.* 3*s.* 9*d.* mentioned in the said order, together with 3*l.* 8*s.* for eight weeks' expenses of the said lunatic in the asylum from the date of the said order to the commencement of this action.

Pashley, for the plaintiffs.—Stat. 12 & 13 Vict. c. 82, was passed to relieve boroughs from contribution to certain county rates. By sect. 2, all boroughs which had provided a lunatic asylum of their own were exempt from contribution to the maintenance of lunatics in the county asylum; and, by sect. 3, the expenses of casual lunatics sent from such boroughs were to be borne by the borough, and not by the county. Sect. 3 is repealed by stat. 18 & 19 Vict. c. 105, s. 14, and a different enactment substituted. According to the construction put upon it by the defendant, the county is to be liable if the borough fund contributes *873] to the expenses *of the gaol; but that is a matter wholly irrelevant. This construction is so absurd that the Court will read the enactment, as is suggested in the case, so as to make the liability of the county or borough depend upon whether the borough contributes to the county expenses in respect of lunatics.

Macaulay, contra.—The defendant is not liable unless there is some statute to make him so. The first Lunatic Act (8 & 9 Vict. c. 126), by sects. 2 to 8, requires that every county and every borough shall provide a sufficient asylum: but, though the borough was to provide the

asylum, a pauper lunatic whose settlement could not be ascertained was, by sect. 59, to be supported by the county, though sent from the borough. Then came stat. 12 & 13 Vict. c. 82, already brought to the notice of the Court. That Act relieved boroughs having an asylum of their own from contribution in respect of lunatics in the county asylum, but did not in any way affect the liability to contribute to a proportion of the sums expended out of the county-rate under stat. 5 & 6 W. 4, c. 76, s. 117. By sect. 3 of stat. 12 & 13 Vict. c. 82, the expenses of casual lunatics sent from a borough were to be borne by the borough, not by the county. Stat. 16 & 17 Vict. c. 97, followed: that repealed and to a great extent re-enacted most of the statutes relating to lunatics; but stat. 12 & 13 Vict. c. 82, was apparently overlooked. At all events, it was not mentioned, although by sect. 98 the liability for casual lunatics seems in all cases to be imposed on counties. That gave rise to doubts; and the Legislature put an end to them by stat. 18 & 19 Vict. c. 105, sect. 14: "And whereas doubts are entertained as to the chargeability *of pauper lunatics found in boroughs whose settlements cannot be ascertained, and it is expedient to remove such doubts: section 3 of the Act" (12 & 13 Vict. c. 82), "shall be repealed; and where any pauper lunatic is not settled in the parish by which, or at the instance of some officer or officiating clergyman of which, he is sent to an asylum, registered hospital, or licensed house, and it cannot be ascertained in what parish such pauper lunatic is settled, and such lunatic was found in a borough having a separate court of quarter sessions of the peace, and which is not liable, under the Act" (5 & 6 W. 4, c. 76, s. 117), "to the payment of a proportion of the sums expended out of the county-rate, such lunatic may be adjudged to be chargeable to such borough by any two justices of such borough; and it shall not be lawful for any justices to adjudge such lunatic to be chargeable to any county, nor to make any order upon the treasurer of any county for the payment of any expenses whatsoever incurred or to be incurred in respect of the said lunatic; and all the provisions in the Lunatic Asylums Act, 1853, as to the mode of determining that a pauper lunatic is chargeable to a county, and as to the order to be made for the maintenance of such pauper lunatic, shall extend and be applied to such borough, as fully and effectually, to all intents and purposes, as if all the said provisions were repeated and re-enacted in this Act, and made applicable to such borough, in the same manner in all respects as though for the purposes of this provision such borough were a separate and distinct county." On reference to stat. 5 & 6 W. 4, c. 76, s. 117, it will be seen that it refers to two well-known classes of boroughs having separate courts of quarter sessions, those which, before the passing of stat. 2 & 3 W. 4, *c. 64, "were chargeable with or liable to contribute in whole or in part to the county-rate" of the county in which they are situated, and those which were not so liable. Boroughs of the first class are made liable to the payment of a proportion of the sums expended out of the county-rate; no such liability is imposed on boroughs of the second class. Birmingham is a borough having a separate court of quarter sessions, which was liable to the county-rate of Warwickshire, and which is brought under the provisions of stat. 5 & 6 W. 4, c. 76. It is therefore not within the provisions of stat. 18 & 19 Vict. c. 105, s. 14; and the county is still liable under stat. 16 & 17 Vict. c. 97, s. 98. [Lord

CAMPBELL, C. J.—Can you suggest any reason why the Legislature should make the liability of the borough to support lunatics depend upon their liability to contribution under the Municipal Corporation Act? It is difficult to say what are the motives of the Legislature, especially where the interests of counties and boroughs clash. In such a case the Act is in the nature of a compromise; and it is impossible to say what concession the county members may have made to the borough members to induce them to consent to this enactment. But, at all events, the language is explicit, and clearly defines the class of boroughs which are to be liable; and Birmingham is not included in that definition.

Pashley was heard in reply.

LORD CAMPBELL, C. J.—It certainly seems that a more equitable arrangement might have been made by which this burthen would have been cast on a borough such as Birmingham; but the words of the Act *876] are too strong to admit of doubt. We must construe words in their natural grammatical meaning, unless some sufficient reason appears why the construction should be different; and there is no such reason here.

COLERIDGE, J., WIGHTMAN, J., and CROMPTON, J., concurred.

Judgment for the defendant.

WILLIAM BROWN v. AMELIA BROWN. Jan. 26.

A. executed a will, and afterwards executed a second will, which he took away with him. On his death the earlier will was found; but the second will could not be found. The solicitor, who prepared the second will, gave evidence, from recollection, of its contents, which were inconsistent with the first will, and revoked it. On a case where the Court had power to draw inferences of fact:

Held, that secondary evidence might be given of the contents of the last will, and that the evidence given sufficiently showed that it revoked the first will.

That the facts that the second will was last seen in the custody of the deceased, and could not be found, raised a presumption that he had destroyed it, *animo cancellandi*, and cast on those seeking to establish the will the onus of rebutting that presumption; and, this not being done, the Court held that A. died intestate.

EJECTMENT. On the trial, before Lord Campbell, C. J., at the Sittings after Michaelmas Term, 1857, the verdict was entered for the plaintiff, subject to the following case.

The plaintiff is the eldest son and heir-at-law of William Brown, deceased, late of Whitby: and the defendant is the widow of the said William Brown, deceased, and the mother of the plaintiff. William Brown, the father, had four sons and two daughters, all of whom are still living. The plaintiff, who is the eldest child, was at his father's death of the age of thirty years; a daughter, Eleanor, who is the youngest child, was then of the age of seventeen years. At the time of the making of his will first hereinafter mentioned, and from thence until the time *877] of his death, William Brown, the father, was seised in fee of real estates of about the value of 40,000*l.*, including the messuage the subject of this action. He was also possessed of personal property of considerable value. In November 1846, and from thence until some time in the spring of 1855, William Brown, the father, was not on good terms with the plaintiff. On the 6th day of November, 1846, William

Brown, the father, being so seised and possessed as aforesaid, made his will in writing, which was duly executed and attested so as to pass real and personal estates. By this will the testator, after directing his debts and funeral and testamentary expenses to be paid out of his personal estate, and giving his household goods and furniture, plate, linen, and china to his wife, the now defendant, for her absolute use, gave to the plaintiff an annuity of 50*l.* per annum for his life, payable half-yearly, the first payment to commence and be made at the expiration of six months after his wife's decease; and after the plaintiff's decease bequeathed the principal sum of 2000*l.* equally between and among the plaintiff's lawful issue, payable on their attaining their respective ages of twenty-five years, the interest or dividends thereof in the mean time from the plaintiff's decease to be applied towards the maintenance, education, and support of such issue during infancy. And the said testator by that will gave to his wife, the now defendant, to his cousin Robert Porritt, and to his friends John Chapman and Thomas Fishburn, all his real and personal estates and effects, to hold the same unto and to the use of his said wife, the said Robert Porritt and John Chapman and Thomas Fishburn, their heirs, executors, administrators, and assigns, Upon trust, after paying his debts and funeral and testamentary expenses, to pay and apply the rents, dividends, *and proceeds arising from [*878 the trust estates towards the support of his said wife during her widowhood, and the maintenance, education, and bringing up of all the testator's children then born or thereafter to be born; and, upon the decease or marriage of his said wife, then upon trust to pay the said rents, dividends, and proceeds equally between and among all his children except the plaintiff, at and when they should attain their respective ages of twenty-one years, for their respective natural lives. And the said testator by his said will declared and directed that the respective lawful issue of his said wife, except the plaintiff, should become entitled to the entirety of the said trust estates, moneys, and effects in equal shares as tenants in common, and not as joint tenants, to whom the said testator gave and devised and directed his said trustees to convey the same accordingly. This will was prepared by Mr. Robert Breckon, of Whitby, who then, and thence until the death of the testator, was the testator's confidential attorney and solicitor. On the 18th July, 1855, William Brown, the father, called on Mr. Breckon at his office in Whitby, and gave him instructions for a new will, which Mr. Breckon reduced to writing. Mr. Breckon himself afterwards prepared a draft of such will, in conformity with the instructions, and forwarded the draft to William Brown, the father, at his private residence. On the 20th July, in the same year, William Brown, the father, brought the draft to Mr. Breckon at his office, and requested Mr. Breckon that he would himself engross the will from the draft, as he, Mr. Brown, did not wish that the clerk in Mr. Breckon's office should know the contents of the will. Mr. Breckon accordingly engrossed the will from the draft: and on the following day the *will was duly executed by the said [*879 William Brown, the father, and attested by Mr. Breckon and a Mr. John Stevenson, another client, who happened to be in Mr. Breckon's office at the time; such execution and attestation being in such manner and form as required to pass real and personal estates. The foregoing facts, as to the making and execution of the last-mentioned will, were

proved by Mr. Breckon, who was a witness at the trial; he also proved that the said will, having been so executed and attested, was put into an envelope and taken away by the testator, who said he should probably leave it at his bankers'. Mr. Breckon also proved that, before quitting his office, the testator himself destroyed the written instructions and the draft of the said will, and that he, Mr. Breckon, had nothing in writing to show what the contents of the said will were. Towards the close of the year 1855 the eyesight of the testator was greatly impaired, from cataracts formed on his eyes: and in January, 1856, the plaintiff, having been reconciled to the testator, went and resided with him at Whitby, and continued to reside with him until the death of the testator as hereinafter mentioned. The eyesight of the testator becoming gradually worse, he, on the 31st of October, 1856, went up to London for the purpose of submitting to an operation on his eyes. At that time, and until his death, he was unable to read. He was at first accompanied by the said Robert Porritt, as the plaintiff was, by his father's directions, detained in the north of England upon business: but in a short time the plaintiff went to his father in London; whereupon the said Robert Porritt quitted London and returned to Whitby. Two operations on the testator's eyes were performed in London, but without success; and on *880] the *19th of February, 1857, shortly after the second of such operations, the testator suddenly and unexpectedly died in London, having never returned to Whitby. On the death of the testator, the will of November, 1846, was found in the breast pocket of a loose coat which he daily wore: in the same pocket were some other old letters and papers of no value. The testator took no apparent interest in the preservation of the said will and papers, which were daily taken out of the pocket by the servant who brushed the coat. The will was not sealed up, and was read by the nurse who waited on the testator; and she mentioned the fact that it was in the pocket to Mr. Porritt and the plaintiff; but the testator never mentioned it to any one. The will of July, 1855, has never been found, although search has been made for it at the testator's private residence, at his bankers', and in every place where it was at all likely to have been deposited or left by the testator. The Lord Chief Justice, being satisfied that a proper and unavailing search had been made for the said will of July, 1855, admitted parol evidence of its contents, notwithstanding the objection of the defendant's counsel that such parol evidence was inadmissible. Mr. Breckon then stated that by his said will the said testator gave the aforesaid Cliff House to his wife, the now defendant, absolutely, together with an annuity for her life of 300*l.*; then a devise of his realty and personalty to the said Robert Porritt and to John Chapman, of St. Hilda's Terrace, Whitby, upon trust to sell, and out of the produce thereof to pay his debts and funeral and testamentary expenses, and the said annuity of 300*l.*, and the residue in equal division between his said six children, reserving therefrom 2000*l.*, which the testator had given to his son *881] *Robert. Mr. Breckon also stated that the will contained a clause revoking all former wills by the testator made; and that John Chapman of St. Hilda's Terrace is a different person from the John Chapman mentioned in the will of 1846. The Court is at liberty to draw such conclusions as the Court thinks a jury ought to have drawn. The plaintiff contends that the will of 1855 must be presumed to have

been destroyed by the testator, or by his directions, as it cannot be found; and, consequently, that William Brown, the father, died intestate.

The questions for the opinion of the Court are:

First. Was the will of July, 1855, provable by parol for any purpose? If so, Was the will of November, 1846, revoked thereby?

Secondly. If the will of November, 1846, was so revoked, did the said William Brown, the father, die intestate, or was the will of 1855 an operative will upon the death of the said William Brown, the father?

Knowles, for the plaintiff.—If either of these wills stands, the plaintiff must fail; for the legal estate is not in him under either of them: but, if the father died intestate, then, as heir-at-law, he is entitled to recover; and this is the effect of the facts stated in the case. Before stat. 7 W. 4 & 1 Vict. c. 26, a will revoked by another might be revived by the cancellation of the revoking will: *Goodright dem. Glazier v. Glazier*, 4 Burr. 2512: but by that Act, sect. 22, a will once revoked can be revived only by re-execution or by a codicil. If, therefore, the will of 1846 was ever revoked, it is gone. Now, though the execution of a subsequent will is not necessarily a revocation of a prior will, yet, if a subsequent will contains *words of revocation, or if it is inconsistent in its provisions with a prior will, it is a revocation of it: [*882 *Hitchins v. Basset*, 3 Mod. 203; *Harwood v. Goodright*, lessee of Rolfe, 1 Cowp. 87; and the contents of the revoking will, if it be lost, may be shown: *Helyar v. Helyar*, 1 Phil. Rep. Lee's Judgments 472, 510. There can be no doubt, from the evidence given in this case, if admissible, that the will of 1855 for both reasons revoked that of 1846. And, if that will of 1855 was itself afterwards cancelled, the testator died intestate. The cases and the reason of the thing show that, if a will is shown to have been in the custody of the testator, and is not to be found, the presumption is that the testator destroyed it *animo cancellandi*; and the onus of rebutting that presumption lies on those who seek to set up the will. It is said in 1 Williams on Executors 137 (5th ed.): "If a testament was in the custody of the testator, and upon his death it is found among his repositories mutilated or defaced, the testator himself is presumed to have done the act; and it has already appeared that the law further presumes that he did it *animo revocandi*. So, where a testator has a will in his own custody, and that will cannot be found after his death, the presumption is that he destroyed it himself: it cannot be presumed that the destruction has taken place by any other person without his knowledge or authority; for that would be presuming a crime. And this presumption holds with respect to duplicate wills: hence, if a will was executed in duplicate, and the testator has the custody of one part, and it cannot be found, after his death; the presumption of law is, that he destroyed it *animo revocandi*; and both parts are consequently to be considered revoked, unless such presumption be rebutted." There are numerous *authorities referred to by the author as proving this position. The leading case is *Helyar v. Helyar*, 1 Phil. Rep. [*883 Lee's Judgments 472. The whole authorities were reviewed in *Cutto v. Gilbert*, 9 Moore P. C. 131, the facts of which were nearly the same as those in the present case. There, a will was produced. Proof was given that a subsequent will was executed and in the testator's custody. This will after his death could not be found. But it differed in this, that no further evidence of the provisions of the second will could be given

than that, when he executed it, the testator called it his will. The Judge of the Prerogative Court thought that the second will necessarily revoked the first, and, being itself not found, must be taken to be revoked; and therefore that the deceased died intestate. On appeal, the Judicial Committee reversed this decision, but only on the ground that the subsequent will was not necessarily a revocation of a prior one, and that "the respondent, upon whom the onus probandi lies, has failed to prove what the law requires, the execution of a subsequent will expressly revoking the former, or of different contents." Here the parol evidence establishes a second will, both expressly revoking the former and of different contents. This puts an end to the former will, which cannot be revived except by re-execution: *Major v. Williams*, 3 Curteis 432. The recent statute 7 W. 4 & 1 Vict. c. 26, has made no difference as to the presumption of cancellation arising from a will in the testator's custody being found cancelled, or not being found at all. That presumption still remains, as was laid down in *Davies v. Davies*, 1 Phil. Rep. Lee's Judgments 444, and *Helyar v. Helyar*.

*884] *G. Rochfort Clarke*, contra.—The Court cannot judge of the legal effect of the second will unless they know its very words. The witness had no draft of the will. [Lord CAMPBELL, C. J.—That is not an objection to the admissibility of the parol evidence, but an observation on its weight.] In *Harwood v. Goodright*, lessee of Rolfe, 1 Cowp. 87, the first will was held not to be revoked, though the finding of the jury in the special verdict went as far as anything that can be fairly inferred in this case. [COLERIDGE, J.—The decision in that case turned upon this, that the jury found that the disposition in the second will was different from that in the first, but in what particulars was unknown. The finding was not that the dispositions in the two wills were inconsistent with each other. Besides, here there was a clause of revocation.] The only reason for the witness saying so was that he usually inserted it in his drafts of wills; he had no recollection of the fact. [Lord CAMPBELL, C. J.—At the trial I had no doubt either of the veracity of the witness or of the accuracy of his recollection; but now we can look only to the statement in the case.] At all events, the second will entitles the defendant to a verdict. It is not a necessary presumption of law that the will was cancelled. [CROMPTON, J.—I do not understand Mr. *Knowles* to contend that it is a presumption not capable of being rebutted, but merely that it is a shift of the burthen of proof, casting the onus upon you to show that the will was not cancelled by the testator. Lord CAMPBELL, C. J.—Certainly the fact of the will being last traced to the possession of the testator, and not being found, *885] is not conclusive that he cancelled it. If, for instance, it could be shown that the heir-at-law had access to the place where the testator had deposited the will, and grounds could be shown for a suspicion that he destroyed it, it would be a case to consider. But, in the absence of any such rebutting facts, is it not *presumptio juris* that the testator cancelled it himself? I quite agree that it is not *presumptio de jure*.] The will having been shown to be executed, the onus of proof lies on those who seek to show that it was cancelled. [Lord CAMPBELL, C. J.—Probably you are right; but the question is, whether they have not done enough for that purpose when they show that the will was in the custody of the testator himself, and that on his death it cannot be found.

COLERIDGE, J.—In *Welch v. Phillips*, 1 Moore P. C. 299, I find Parke, B., says: “Now the rule of the law of evidence on this subject, as established by a course of decisions in the Ecclesiastical Court, is this: that if a will, traced to the possession of the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect, unless there is sufficient evidence to repel it. It is a presumption founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety, and would not be either lost or stolen; and if, on the death of the maker, it is not found in his usual repositories, or else where he resides, it is in a high degree probable that the deceased himself has purposely destroyed it. But this presumption, like all others of fact, may be rebutted by others which raise a higher degree of probability to the *contrary. The onus of proof of [*886 such circumstances is undoubtedly on the party propounding the will.”] The blindness of the testator here renders it probable that he destroyed the second will by mistake, meaning to destroy the first.

Knowles was not called upon to reply.

LORD CAMPBELL, C. J.—I am of opinion that the plaintiff, as heir-at-law, is entitled to recover. I feel no doubt that evidence of the contents of the second will was properly received at *Nisi Prius*; for it was the common case of a lost instrument; and parol evidence of the contents of a lost instrument may be received as much when it is a will as if it were any other. Then we have a witness who deposes that he had read the instrument and had a recollection of its contents. His recollection is admissible as secondary evidence; the weight to be given to it is a question for the jury, for whom we are substituted. In this case the evidence leaves no doubt in my mind. The witness stated that in the will there was an express clause of revocation; and I believe that there was such a clause: but, even if there had not been one, the contents of the second will are proved to be such as necessarily to revoke the first. The same property is by the two wills devised to different persons: that is inconsistent; and therefore the first will is revoked. Then comes the question whether the second will is to be considered operative; for, if it is, the first legal estate is in the defendant, and the plaintiff fails. But I think that, as the facts appear, that will must be considered as having been cancelled by the testator *animo revocandi*. After execution the will was *delivered to the testator; and it is [*887 never seen in any other custody. The testator said he should take it to his bankers; but he never did so: and on his death, though it has been searched for, it has not been found. It must therefore be considered as destroyed; and I think the presumption is that the testator destroyed it. That is a reasonable presumption, as he had the last custody of it, and it is not forthcoming. Whether this is a presumption of fact, or a presumption of law liable to be rebutted, is not material; these facts give rise to a presumption shifting the onus of proof. As early as 1754, in *Helyar v. Helyar*, 1 Phil. Rep. Lee’s Judgments 472, we find a great Judge, Sir George Lee, laying down these principles and acting on them; nor have they ever been doubted since. In *Welch v. Phillips*, 1 Moore P. C. 299, another very great Judge, the present Lord Wensleydale, lays down the principle that this is a pre-

sumption of fact to prevail unless rebutted; and the same doctrine is laid down in *Cutto v. Gilbert*, 9 Moore, P. C. 131, by another great Judge, Dr. Lushington, than whom no one has had more experience in such cases. Then our attention is very properly called to the facts and circumstances: but I see no facts to raise the presumption that the testator did not destroy the second will. It is true that it is improbable that he should have wished to set up the first will, as he had become reconciled to his son: but I see nothing to rebut the presumption that it was he who destroyed the second.

COLERIDGE, J.—I am of the same opinion. It seems to me that the evidence is all one way as to the revocation of the first will; for Mr. *888] Breckon states that its provisions were wholly inconsistent with those of the second will; and he obviously knew enough of the second will, which he himself had drawn, to be able to give satisfactory evidence of its contents. Besides this, there was an express clause of revocation. Even if we assume that his recollection on this point was no more than that it was his invariable routine to insert such a clause, that would be to my mind the most satisfactory evidence of a matter of routine. Then it cannot be denied that, the second will being last seen in the testator's custody and not found after his decease, there arises a presumption that he destroyed it *animo cancellandi*; and the onus of rebutting that presumption lies on those who seek to set up the will. In this case I cannot see circumstances sufficient in my mind to rebut it.

WIGHTMAN, J.—I am of the same opinion. I think that the evidence was admissible, and that the facts raise a presumption of fact, on which we should act, that the second will was cancelled. I think that the first will was revoked by the second, and that the presumption of the revocation of the second has not been rebutted, and therefore that the deceased died intestate. There was no need to prove the precise words of the last will, if enough appeared to show that it revoked the first. And the first, being once revoked, could not be revived without re-execution. Then, as the second will was taken away by the testator and never seen since, and cannot be found on strict search, it must be taken to have been cancelled. *Helyar v. Helyar*, 1 Phil. Rep. Lee's Judgments 472, *889] is closely in point: it is acted upon and confirmed in the cases already cited in the Privy Council; and these authorities are decisive.

CROMPTON, J.—I am of opinion that it is sufficiently established that the first will was revoked by the second. The attorney who drew the second will is called as a witness; and, secondary evidence being admissible, he gives evidence that it contained a clause of revocation. It is said he only gave that evidence because it was his course of practice to insert one; if it were so, it would not affect his testimony; it is every day's practice to act on the evidence of clerks who remember nothing but that they would not have signed a receipt unless they had received the money; and there are many similar cases. The main question is, whether the second will was destroyed by the testator *animo cancellandi*. The cases cited establish what the course of evidence is. Frequently a state of facts shifts the burthen of proof from one side to the other. For instance, in the case of a bill of exchange, the presumption is that the holder gave value for it, till evidence may be given by the other side that shifts the onus and calls on him to prove value. Such cases are

not presumptions of law, which cannot be rebutted, but instances of the course of evidence shifting the burthen of proof. In *Welch v. Phillips*, 1 Moore, P. C. 299, Lord Wensleydale explains the rule in cases of intestacy very satisfactorily on this principle. Then I do not say that there are no circumstances here which it might be proper to leave to a jury as tending to rebut this presumption; but I give my decision on the ground that I do not see enough to lead me to draw that inference.

Judgment for plaintiff.

After the due execution and once existence of a will have been established, its contents may be proved by parol, in case of the loss or destruction of the original, like those of any other written instrument. Even the more stringent provisions of modern legislation, with regard to testamentary dispositions, have created no exception to the common law rule in this respect: *Havard v. Davis*, 2 Binn. 406; *Reeves v. Reeves*, 2 Rep. Const. Ct. N. S. 334; *Dan v. Brown*, 4 Cowen 483; *Jackson v. Betts*, 6 Id. 377; 9 Id. 208; *Graham v. O'Fallon*, 3 Missouri 507; *Dickey v. Malechi*, 6 Id. 177; *Steele v. Price*, 5 B. Monr. 59; *Kearns v. Kearns*, 4 Harrington 183; *Jones v. Murphy*, 8 Watts & Serg. 300; *Gaines' App.* (Sup. Ct. Louisiana), 4 American Law Reg. 364. This proof, moreover, may be made by the means of a single witness, whatever the statutory requisitions in respect to the original attestation: *Dan v. Brown*, 4 Cowen 483; *Jackson v. Betts*, 6 Id. 377; *Dickey v. Malechi*, 6 Missouri 177; *Kearns v. Kearns*, 4 Harr. 183; *Baker v. Dobyns*, 4 Dana 221. But the evidence must be very clear and satisfactory, and must come from one who has actually read the will and in that way obtained a knowledge of its contents, except in cases of spoliation or fraud, where greater latitude is allowed: *Davis v. Sigourney*, 8 Metc. 487; *Eure v. Pitman*, 3 Hawks 364; *Hylton v. Hylton*, 1 Gratt. 161; *Rhodes v. Vinson*, 9 Gill 169; *Chisholm's Heirs v. Ben*, 7 B. Monr. 415; *Jones v. Murphy*, 8 Watts & Serg. 275; *Clark v. Morton*,

5 Rawle 235. In some of the cases, indeed, it has even been held that the evidence must be of the whole contents without exception or omission: *Rhodes v. Vinson*, 9 Gill 167; *Davis v. Sigourney*, 8 Metcalf 487; *Durfee v. Durfee*, Id. 490, in note. But in others, the more reasonable doctrine has prevailed, that probate may be made of so much as can be satisfactorily established, if it be complete and consistent in itself: *Steele v. Price*, 5 B. Monr. 72; *Jackson v. Jackson*, 4 Missouri 210. And it is not necessary that the witness should be able to recall the exact words of the will; it is sufficient if the substance is given: *Allison v. Allison*, 7 Dana 95.

In like manner, in order to establish the revocation of a prior will, which has continued in existence, proof of the contents of a subsequent will which has been lost, destroyed, or cancelled, is admissible; or *e converso* to establish the revocation of a subsequent will, the contents and republication of a prior will may be shown by parol evidence: *Havard v. Davis*, 2 Binn. 406; *Legare v. Ashe*, 1 Bay 464; *Jones v. Murphy*, 8 Watts & Serg. 275; *Day v. Day*, 2 Green Ch. 330. But in order to produce this effect it must be proved that the lost will contained an express clause of revocation, or the contents thereof must be so clearly and fully ascertained as to leave no doubt how and to what extent its dispositions are inconsistent with the remaining will: *Nelson v. McGiffert*, 3 Barb. Ch. 158; see *Jones v. Murphy*, 8 Watts & Serg. 295, 300; though in case of spoliation or fraud

this is not necessary: *Jones v. Murphy*, 8 Watts & Serg. 275; for, as the Court in that case say, "It is better, surely, that a person should die intestate, than that the spoliator should be rewarded for his villany."

Where a will is proved to have been once duly executed, and to have remained afterwards in the testator's possession, but at his death cannot be found, the presumption is that it was destroyed by him *animo revocandi*: *Legare v. Ashe*, 1 Bay 464; *Clark v. Wright*, 3 Pick. 67; *Bowen v. Idley*,

11 Wend. 227; *Betts v. Jackson*, 6 Wend. 173; *Brown v. Brown*, 10 Yerg. 84; *McBeth v. McBeth*, 11 Alab. 596; *Weeks v. McBeth*, 14 Id. 474; *Clark v. Morton*, 5 Rawle 242; *Jones v. Murphy*, 8 Watts & Serg. 275; see *Steele v. Price*, 5 B. Monr. 68. But this presumption is necessarily but a slight one, and may be rebutted by facts and circumstances leading to an opposite conclusion: *Steele v. Price*, 5 B. Monr. 68; *Jones v. Murphy*, 8 Watts & Serg. 275.

*890] *FORREST and Others, Appellants, v. The Churchwardens, Overseers, and Governor, and Directors of the Poor of the Parish of GREENWICH, KENT, Respondents. Jan. 26.

F. moored a barge in the Thames between high and low water mark: the moorings were stationary, in the bed of the river; and the barge floated at high water and grounded at low water on the posts in the bed of the Thames by which it was moored, and which were in the parish of G. The barge was connected by a chain with stairs on the land, the soil of which was not the property or in the occupation of A., and which was at that point a common highway to the Thames. Movable planks were laid from the shore on to the barge, and thence to another barge moored farther out in the Thames, and which always floated. By this means a pier was constructed, which was permanently kept there and used for embarking in steam-boats, and landing from them; and F. was remunerated by the parties so using; and he had the sole control of the pier.

Held that he was rateable to the poor-rate for G., as occupier of land in the bed of the river.

THE appellants having given notice of appeal against a rate made for the relief of the poor of East Greenwich, Kent, by consent, and order of a Judge, the following case was, under stat. 12 & 13 Vict. c. 45, s. 11, stated for the opinion of this Court.

In the parish of East Greenwich, in Kent, and next and extending into the river Thames (hereinafter referred to as "The River"), and which at the part thereof next to the said parish now is, and always has been, a navigable and tidal river, and common and public highway, there now is, and for one hundred years and upwards last past there has been, for all the liege subjects of this realm, to go on board of and land from boats and other vessels in the river or common and public highway, a common public shipping and landing place called Garden Stairs (hereinafter referred to as "The Stairs"), consisting of stone steps or stairs, which abut upon a certain public street and highway called Church Street in the said parish, and form a continuation of the same street, and

*891] which extend thence *northwards into The River, and rest upon the bed thereof, and are at high water partly covered by the same.

In the year 1843 a friendly society called The United Greenwich Watermen's Floating Accommodation Society (hereinafter referred to as

"The Society"), and consisting entirely of free watermen of the river Thames, whose rules have been duly certified and enrolled pursuant to the statutes in such case made and provided, was formed and constituted at Greenwich, which Society has established and now maintains, in the manner hereinafter mentioned, and in addition to, and for the more convenient use by the public of, the stairs, a floating pier, or landing place for the landing, embarking, and accommodation of persons desirous of landing from or going on board of boats and other vessels in The River, and with the intention of periodically dividing amongst the members of the Society the profits, if any, arising from such floating pier or landing place, after paying all necessary expenses of and attending the same; which Society now consists of one hundred and sixty-five members.

The said pier or landing place now consists, as it has done ever since it was first constituted, of such barges or dummies, and platforms or bridges, as hereinafter mentioned; that is to say, of two floating barges, or dummies, boarded over and kept in their place by iron chain cables fastened to iron anchors placed in the bed of The River, and by an iron chain from one of the said barges to an iron staple fixed in the stairs, and of two platforms on bridges.

One of these barges (hereinafter referred to as "The First Barge"), that is to say, that one of them which is next to The Stairs, floats at high water, and at low *water rests on grounds or blocks fixed [*892 in the bed of The River for that purpose. The barge is so placed as that the same, for the whole length thereof, extends in a line with or from a place near to The Stairs directly into and partly across The River: the other of the said barges (hereinafter referred to as "The Second Barge"), which is always afloat, is placed in a line with the course, and parallel to the sides, of The River; so that one end thereof is near to that end of the First Barge which projects into The River, and is furthest from The Stairs. One end of one of the said platforms or stages rests on and occupies part of, and covers some feet in breadth of, the said Stairs; and the other end thereof rests on that end or part of The First Barge which is nearest to The Stairs, thereby forming an easy and safe communication for passengers between The Stairs and The First Barge. This platform or stage, which is movable and not in any way fixed or fastened, but when in use merely laid down so that the ends thereof rest as aforesaid, is every night altogether removed from The Stairs.

With respect to the other of the said platforms or stages, one end thereof rests on that end or part of The First Barge which is nearest to The Second Barge; and the other end thereof rests on that end or part of The Second Barge which is nearest to The First Barge, thereby forming an easy and safe communication for passengers between the said two Barges.

The said Barges, platforms or stages, and the moorings of the same, are all situate within the parish of Greenwich.

By means of The Stairs, and the said pier or landing place (which, from the time when it was first made, has *been such and constructed as hereinbefore mentioned, and kept in its proper place [*893 as hereinbefore mentioned, and not otherwise fixed or attached), passengers can at all times land from or go on board of steamboats and other

boats and vessels in The River coming alongside the said pier or landing place, which rises or falls with the tide.

From the first construction of the said pier or landing place, in the year 1843, to the present time, The Society have kept up and maintained the same, and paid all expenses of so doing, and also of managing and conducting the business and concerns thereof.

No person sleeps, resides on, or inhabits the said pier or landing place. The persons who conduct and attend to the business relative to it attend by day; and a watchman or attendant in that behalf, appointed and paid by the Society, watches it by night to prevent accidents and protect it from injury. There is a cabin in The Second Barge fitted up for his accommodation.

The said Society allows the proprietors of steamboats, using the said pier or landing place, to have upon The Second Barge a movable pay-box, not in any way affixed or attached to such Barge, in which pay-box the servant of such proprietors receives from the passengers going on board the steamboats their fares, and delivers to them their steamboat tickets. This pay-box is used only during the hours of business, and is locked up at other times.

No house, building, land, or other premises whatever are or is in any manner whatever occupied, held, or used along or in any manner in connection with the said pier or landing place, or the Barges or dummies, *894] bridges or stages, of which it consists, unless the matters herein *mentioned, or any of them, should be held to be such an occupation, holding, or using.

The revenue and profit of and arising from the said pier or landing place consist of the sums and moneys paid by the proprietors of steamboats and vessels, conveying passengers on the river, for the privilege of using the said pier or landing place for the purpose of landing and taking on board their respective passengers; and which sums and moneys are, by such proprietors, paid periodically to The Society according to the terms of an agreement. (A copy of the agreement was annexed; but nothing turned upon it.)

In addition to the user of the said pier by proprietors of steamboats, the watermen, being members of the said Society, as well as other watermen, are in the habit of using the same for embarking and landing passengers into and from their own boats and wherries.

Before and at the time of making the rate or assessment at 11d. in the pound, hereinbefore mentioned (hereinafter referred to as "The Rate"), William Sexton Forrest (and three others named) were, and from thence hitherto have been, and still are, members of The Society, and the persons in whom the property of The Society is vested, by virtue of the before-mentioned rules: and, for the purposes of this case, are to be taken to represent The Society.

On 30th August, 1857, the churchwardens and overseers of the poor of the said parish, and the parishioners of the same parish, assembled at a vestry meeting, made a certain rate or assessment at 11d. in the pound: in and by which the appellants, by reason and in respect of their being such members as aforesaid of The Society, and not otherwise or on any *895] other account, and with *reference to the said floating pier or landing place, and not otherwise, are rated and assessed as hereinafter mentioned.

The following is a copy of the said rate or assessment, and also of so much of the schedule annexed to it as relates to the appellants.

No. of assessment.	Name of occupier.	No. of votes.	Name of owner.	No. of votes.	Description of the property, whether land, houses, &c.	Name or situation of property.	If land, the presumed number of acres.	Gross estimated rental.	Rateable value.	Poor-rate at 11d. in the pound.	General rate at 2s. in the pound.
1132	William Sexton Furrest, (&c.)				Land occupied by the stages, platforms, barges, and other matters and things used as a pier for landing and embarking steam-boat passengers.	Garden Stairs.		£ 239	£ 155	£ s. d. 8 9 7	£ s. d. 2 10 10

The Court to be at liberty to order and cause this case to be amended in any manner it shall think proper, and to draw such inferences of fact as the Court of Quarter Sessions might draw.

The question for the opinion of the Court is, Whether the appellants are liable, or ought, in or by the said rate, to have been rated in respect of the matters in respect of which they are rated in and by that rate; and Whether that rate, so far as the same relates to the appellants, is a good and valid rate, or a bad and invalid one, due regard being had to the terms of the local Act 9th Geo. 4, chap. xliii.(a)

*The case was argued on an earlier day in this Term.(b)

Bovill, for the respondents.—The appellants are liable to be [*896 rated, under both stat. 43 Eliz. c. 2, s. 1, and stat. 9 G. 4, c. xliii.(c) They occupy land beneficially within the parish, by means of their barges. For the purpose of rateability, it is not essential that there should be occupation of the surface of the ground. There may be occupation by the possession of pipes under the ground:(d) of a bridge above the ground, *Regina v. Hammersmith Bridge Company*, 15 Q. B. 369 (E. C. L. R. vol. 69); and this would not be varied by the bridge being wholly detached from the ground, as in the case of a tubular bridge: by electric wires carried along posts fixed in the ground: *Electric Telegraph Company v. Overseers of Salford*, 11 Exch. 181.† Occupation by exclusive user is enough, though there be no further property in the soil, as where a party has a right of way to the exclusion of others, *Rex v. Bell*, 7 T. R. 598. So is exclusive occupation by fixing stalls in alieno solo, though the occupation be not continuous: *Roberts v. Overseers of Aylesbury*, 1 E. & B. 423 (E. C. L. R. vol. 72). The pier is here affixed immovably to the soil, by the moorage of the first barge: whether the occupation is rightful as against the public is immaterial: the owner of the soil has permitted it. In *Electric*

(a) Local and personal, public: "For repealing an Act of the twenty-sixth year of the reign of King George the Second, for the better relief and employment of the poor in the parish of East Greenwich, in the county of Kent, and for repairing the highways and cleansing the streets thereof; and for making more effectual provisions in lieu of the said Act."

(b) January 16. Before Lord Campbell, C. J., Wightman and Crompton, Js.

(c) The decision having been grounded entirely on the general law of rateable occupation, the local Act is not further noticed in the report.

(d) See *Regina v. Overseers of Mile End Old Town*, 10 Q. B. 208 (E. C. L. R. vol. 59).

Telegraph Company v. Overseers of Salford, Pollock, C. B., said: "It seems to be conceded, that if the wires of the telegraph passed under *897] ground, the company would be liable; and, in that case, it is not suggested that any difficulty would arise from the fact, that they are subject to removal to some other place. Again, suppose the wires passed under water, would not the Company be liable? Then they are liable if the wires pass through the air, instead of land or water." [Lord CAMPBELL, C. J.—I remember Lord Ellenborough saying that an aeronaut was not guilty of a trespass by passing over land, at a mile's height above it. But a party could hardly be permitted to say that he was a trespasser, and therefore not rateable.] The case is not distinguishable from *Regina v. Leith*, 1 E. & B. 121 (E. C. L. R. vol. 72), where a party was rated for a pier almost identical in its nature with the subject-matter of this rate.

Pigott, Serjt., contra.—The occupation which renders a man liable to rate must be exclusive. In *Rex v. The Trent and Mersey Navigation Company*, 4 B. & C. 57 (E. C. L. R. vol. 10), it was held that a company, which had by agreement, and were exercising, a right to enter upon limestone quarries and take the lime, was not rateable for the occupation of such quarries. In *Rex v. The Mersey and Irwell Navigation Company*, 9 B. & C. 95 (E. C. L. R. vol. 17), a company had, by statute, the power to make and keep a river navigable and take tolls for the navigation: it was held that, by the exercise of this power, they had a mere easement, and not an occupation for which they could be rated. *Regina v. Leith* was decided on the ground that the pier was incident to the occupation of the adjacent land, which the parties rated held *898] under lease: and Wightman, J., there said: "Had the rate been laid on the barges only, as distinct from the land, I should have paused before I affirmed it." But in *Regina v. Morrison*, 1 E. & B. 150 (E. C. L. R. vol. 72), where there was a floating dock attached to land, as the pier in the present case is, the Court, considering that, under the circumstances, the dock was not accessory to the land, reduced the rate by taking off the separate value of the dock. There is no pretence here for treating the barges as accessory to the land. Could a floating bath be rated? [CROMPTON, J.—The place there was not of the essence of the structure: here the barges belong to the particular place. Lord CAMPBELL, C. J.—And the floating dock, in *Regina v. Morrison*, might have been placed anywhere in the river.] All that can be said is that here the barges are not in fact carried away: it is like the case of a ship aground. The appellant could not have maintained trespass against a party excavating the bottom of the river below the barge. [Lord CAMPBELL, C. J.—Suppose any one took up the moorings.] The law will not notice so slight an occupation of the soil. This is a stronger case than *Regina v. Morrison*; for the soil is here the property of the Crown, and the barges are rated per se. It is as if there were a claim to rate any ship that anchors in the parish. [Lord CAMPBELL, C. J.—Could a bridge like that over the Rhine at Cologne be rated?] Possibly that might be likened to the case of the electric telegraph. What action could the appellants bring against a party who attached his boat to their staples? In *Williams v. Williams*, 12 East 346, it was held that the owner of boats, which he attached to a post standing in the King's highway, was not rateable as occupier.

Bovill*, in reply.—In *Regina v. Morrison*, the dock was a mere movable: it was in different parishes according to the state of the tide. [899* *Cur. adv. vult.*]

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

We are of opinion that the appellants are properly rated for land occupied by the platforms and other matters used as a pier for landing and embarking steamboat passengers.

Had the pier always rested on the ground, no question could have been raised as to its rateability. At low water it does rest on blocks fixed on the bed of The River for that purpose. At other times it floats; but at all times it is kept in its place by iron chain cables fastened to iron anchors placed in the bed of the river and by an iron chain attached to an iron staple fixed in the stone stairs which constitute the landing-place. There it has remained for fourteen years; and there only can it be used for the purpose to which it is to be applied. It therefore has a locality; and the appellants are the occupiers of land by the use which they make of the blocks, of the stairs for holding the staples, and of the iron anchors permanently placed in the bed of the river. These anchors cannot properly be likened to the anchors of ships dropped for a temporary purpose. This case, therefore, comes much nearer *Regina v. Leith*, 1 E. & B. 121 (E. C. L. R. vol. 72), than to *Regina v. Morrison*, 1 E. & B. 150, on which the appellants' counsel mainly relied. There we held a floating dock not rateable; but for the reason that it had no fixed locality, *that it actually was shifted about from place to place, and that it might be used for the purposes for which it [**900* was constructed, at one place as well as another, as a piece of movable machinery. In the case now before us there is a permanent and profitable occupation of the soil within the parish of the respondents, who are therefore entitled to our judgment. Judgment for respondents.]

The QUEEN v. WILLIAM MUSSON. Jan. 27.

The portion of land on the seashore between ordinary high-water mark and ordinary low-water mark may form part of the parish coming down to the shore; but there is no *prima facie* presumption that it does so; and, in the absence of evidence that it does form part of the parish, it must be taken not to be part of it.

ON appeal, by William Musson, against a rate for the relief of the poor of the parish of Great Yarmouth, in which he was assessed as occupier of a portion of the beach and of the toll-houses belonging to The Wellington Pier, on grounds, amongst others, that a part only of the pier was within the rating parish, the Recorder confirmed the rate, subject to the opinion of this Court on the following case.

It appeared in evidence that The Great Yarmouth Wellington Pier was constructed under the provisions of an Act of Parliament (passed May 9th, 1853,(a)) in accordance with a plan agreed upon. The pier runs into the sea over the land on open piles to the extent of some 700

(a) 16 & 17 Vict. c. xv., local and personal, public: "For constructing and maintaining a pier at Great Yarmouth, in the county of Norfolk, to be called 'The Great Yarmouth Wellington Pier.'"

feet, of which about one-half is above high-water mark and the other half below it. The land over which a portion of the said pier is constructed belongs to the corporation of Great Yarmouth, who are the owners *901] of *all waste land within the limits of the said borough, and is within the rating parish. No conveyance of the said land was taken by The Great Yarmouth Wellington Pier Company from the corporation; and the Company only holds it by a license from the said corporation. A free right of way is reserved to the public under the pier. The land below high-water mark was conveyed to the Company by the Commissioners of Woods and Forests. At the hearing of the said appeal, it was admitted that the appellant was the occupier of the toll-houses and the pier, and in receipt of the profits derived therefrom; but it was contended on behalf of the appellant that, if liable to be assessed at all, he was only liable to be assessed for that portion of the pier which was above high-water mark and in the parish of Great Yarmouth; and that the other portion, being below high-water mark, in law was extra-parochial, and not within the parish. It was admitted that the toll-house was within the parish of Great Yarmouth, and that all the tolls were collected and received within the said parish of Great Yarmouth. The points reserved for the opinion of the Court of Queen's Bench are:

1st. Whether the appellant is liable to be assessed at all as occupier of the tolls, toll-houses, &c., of the said pier.

2d. Whether, if liable, he is liable to be assessed for the whole pier.

3d. Whether he is liable to be assessed save and except for that portion of the pier which is above high-water mark, or whether he is liable to be assessed for so much of the said pier as is above low-water mark.

It was agreed that The Great Yarmouth Wellington Pier Act, the plan *902] in accordance with which the said *pier was built, the conveyance from The Woods and Forests to the Wellington Pier Company, and the lease from the Company to the appellant, should accompany and form part of this case.

The appellant and respondents have agreed as to the amount of the assessment, assuming the whole pier to be rateable, and as to the rateable value both at high and low water mark.

From the plan which was made part of the case, it appeared that about one-quarter of the pier was between high and low water mark, and about the same quantity below low-water mark.

On the case coming on for argument, it was admitted by the counsel for the appellant that the rate was good so far as related to the portion of the pier above high-water mark.

Keane, in support of the order of Sessions.—It is clear that the occupant of the pier occupies the land under it, though that land may be covered with water; and therefore, if the land is within the parish, the occupant is rateable. The question therefore is reduced to this, Whether the whole or what part of the pier is within the parish. It must be admitted that the portion below ordinary low-water mark is not within the parish; but the portion between ordinary high and ordinary low water mark, though *primâ facie* the soil belongs to the Crown, is not in other respects different from any other land.

Pashley and *J. Gray*, *contra*.—The only question is as to the portion of the pier which covers part of what, in *Hale*, *De Jure Maris*, *Pars*

prima, cap. 6, p. 26, is defined *to be "that which is covered by the ordinary flux of the sea." The portion of the shore which is [*903 not covered except at high spring tides does not in any respect differ from the adjoining land which is never covered at all; that portion of the shore which is covered except at low spring tides does not differ from the bed of the sea which is never uncovered at all. But the intermediate portion is *primâ facie* part of the waste of the Crown; and the soil *primâ facie* belongs to the Crown; though the presumption may be rebutted, and it may be proved to be the property of a subject, or to be part of a manor: *Calmady v. Rowe*, 6 Com. B. 861 (E. C. L. R. vol. 60). "And as it may be parcel of a manor, so it may be parcel of a ville or parish; and the evidence for that will be usual perambulations, common reputation, known metes and divisions, and the like:" Hale, *De Jure Maris*, Pars prima, cap. 6, p. 27. The onus lies on those who seek to prove it parcel of a parish; here no evidence is given that the shore is part of the parish of Yarmouth; and the absence of such evidence is strong to show that it is not. [WIGHTMAN, J.—In Com. Dig. *Navigatio* (A), it is said: "So, the soil between high-water mark, and low-water mark, is part of the county, and may be within a manor." He is silent as to whether it is within a parish or not.] All land in England must be in a county, but need not be parochial. If there is any kind of land more likely to be extra-parochial than another, it is the shore where, when parishes were formed, no one could anticipate that there should ever be inhabitants.

Lord CAMPBELL, C. J.—I am of opinion that the appellants are properly rated as occupants of the portion *of the land occupied by [*904 the pier above high-water mark, as indeed is admitted by their counsel. And on the other hand it is conceded by the counsel for the respondents that they cannot be rated for the portion below low-water mark: and it is properly so conceded; for it is clear that the land there is no more within this parish than if it were ten miles out at sea. But the question remains as to the intermediate portion between high-water mark and low-water mark. I am sorry to have to act on what may seem a subtlety; but we are bound by law. It is clear that the soil here is *primâ facie* in the Crown, though it may be proved to be in a subject. And so the spot is *primâ facie* extra-parochial, though it may be shown to be in a parish. The burthen of proof lies on those alleging it to be in a parish; and Lord Hale, in the passage quoted, shows how it may be proved. Then, if the onus lies on those alleging it, how has it been met here? There is not the slightest evidence on the subject. The presumption not being rebutted, we must consider this spot as extra-parochial, and so far quash the rate.

(COLBRIDGE, J., was absent.)

WIGHTMAN, J.—The rate is on the occupant of land which may be divided into three parts: 1. A part above ordinary high-water mark; 2. A part between ordinary high-water mark and ordinary low-water mark; 3. A part below ordinary low-water mark. The appellant now admits he is liable to be rated for the first part; the respondents now admit that he is not liable to be rated for the third part; the question is therefore narrowed to that regarding the intermediate space. Now *there is abundant authority that such land *is* within the county, [*905 and *may* be in a manor, and *may* be in a parish; but there is no

presumption of law that it is within either. It requires evidence to show that it is part of the parish: and here no evidence was given.

CROMPTON, J.—I also am of opinion that the appellant is entitled to succeed as to all below ordinary high-water mark. There is no doubt he is rateable for what is above ordinary high-water mark, and as little that he is not rateable for what lies below ordinary low-water mark: the question is as to the intermediate part. It is not necessary to say that such land is *primâ facie* extra-parochial altogether; but certainly there is no presumption that it belongs to any particular parish: that requires proof. In the present case there is no other proof than that this parish lies next inland above it; and I do not think the fact that the shore belongs to that parish sufficient *primâ facie* evidence to shift the burthen of proof. There being no other evidence that the land is within the parish, it is not to be presumed to be so; and the rate so far is bad.

Rate amended accordingly.

*906] *The QUEEN v. The Local Board of Health of ROTHERHAM.
Jan. 27.

Mandamus commanding a Local Board of Health to make a rate for the purpose of defraying a debt due to the prosecutors. On the record it appeared that the debt was due to the prosecutors, who commenced an action against the Local Board. The Local Board consented to a judge's order, under which judgment was signed with a stay of execution for several months. The prosecutors not having obtained satisfaction, this writ was issued more than six months after judgment had been signed, but within six months of the time to which execution had been stayed. The Local Board resisted on the ground that by The Public Health Act, 1848 (11 & 12 Vict. c. 63, s. 89), they had not power to levy retrospective rates save for charges and expenses incurred within six months before the making of the rate. On demurrer:

Held, that a judgment obtained against a Local Board was a charge within the meaning of the Act, and that a rate might be made to defray it within six months of that charge.

Held, also, that it was not beyond the authority of the Local Board to agree that execution should be stayed for a time; and that, this having been done, the period within which the rate might be made was six months from the time when execution might first have been issued.

Judgment for the Crown.

MANDAMUS. The writ was tested 12th June, 1857. It contained suggestions that, in 1854, contracts were entered into by the Local Board of Health of Rotherham for the execution by the prosecutors of works within the district. That the works were executed; and that, on 21st June, 1856, a balance of 1083*l.* was due to the prosecutors from the Local Board. On that day an action was commenced in the Queen's Bench for the recovery of that sum. It was afterwards agreed between the prosecutors, plaintiffs in that action, and the Local Board, defendants in that action, that the prosecutors should accept 1000*l.* in full satisfaction, and that the Local Board should consent to a Judge's order that immediate judgment should be had for 1000*l.* and interest from 7th March, 1856, and costs, to be paid by the Local Board on 27th December, 1856, and that in default of payment on that day the prosecutors, plaintiffs in that action, might issue execution. That a Judge's order *907] to that effect was obtained on 12th *July, 1856, and judgment was signed on 15th July, 1856. That no payment was made on 27th December, 1856; and that, after giving credit for some payments

subsequent to 27th December, 1856, a balance of 1018*l.* 11*s.* 10*d.* remained due on the 7th May, 1857, "which was and is a charge incurred by and due from you" (the Local Board) "in manner aforesaid after the said 27th day of December, 1856." Further averments of the absence of effects belonging to the Local Board; and that there were no other means of paying the debt than by a rate; and that, on 7th May, 1857, a demand in writing was duly served on the Local Board, requesting them to make rates for the purpose; and a refusal. The mandatory part of the writ was that the Local Board should "make or cause to be made, in due form of law, and in accordance with the provisions of the said statute and any other statutes empowering you in that behalf, a rate or rates for the purpose of raising money for the payment of the said sum of 1018*l.* 11*s.* 10*d.*, being such charge so due from you to" the prosecutors.

Return: "that the said money in the writ mentioned, and therein alleged to have been due to" the prosecutors "as and for the balance of money due to them for and in respect of the works and contracts therein mentioned, was and is an expense which had been incurred by the said Local Board of Health, and was then due and payable from the said Local Board (to wit, by the then members thereof) before the 28th day of February, A. D. 1856, and was not, nor is, a charge incurred by the said Local Board of Health after the 27th day of December, A. D. 1856, as in the said writ alleged; nor was nor is the said balance of money in the said writ mentioned a charge or expense incurred by the said Local Board at any *time within six months before the [908 issuing of the within writ. And that the said expense was so incurred by the said Local Board of Health under and by virtue of the contracts so made and entered into by and between the said Local Board and" the prosecutors "in the year 1854, as in the said writ is mentioned, and was incurred by the said Local Board, and by virtue of the said contracts, in and about works, matters, and things of a permanent nature, and executed and done for the benefit of the district." And that, by the 89th section of The Public Health Act, 1848, it is provided that the Local Board of Health may make and levy the said special and general district-rates, or any or either of them, prospectively, in order to raise money for the payment of future charges and expenses which may have been incurred at any time within six months before the making of the rate. And that the rate which they were commanded to make would be a retrospective rate, in order to raise money for the payment of charges and expenses which have been incurred more than six months from the date and coming of the said writ, and would have been incurred more than six months from the making of the said rate.

There was a further return, which it is unnecessary to notice, as, on the case coming on for argument, it was given up by the defendants' counsel as untenable; and the Court expressed no opinion on it.

Plea 1. As to so much of the said return as is founded upon or relates to the provisions of the said 89th section of The Public Health Act, 1848: "that the said sum of 1018*l.* 11*s.* 10*d.* in the said writ mentioned did not become a charge upon the said Local Board of Health within the meaning of the said statute until the 27th *day of Decem- [909 ber, A. D. 1856; which said last-mentioned day was within six months of the date of the said writ of mandamus, and of the time when

the said rate or rates, which the said Local Board of Health are thereby commanded to make, might and could have been made."

Replication to this plea: "that the said money in the said writ and return mentioned, and therein stated to have been due to" the prosecutors "as and for the balance of moneys due to them for and in respect of the said works and contracts in the said writ and return mentioned, did become and was a charge incurred by the said Local Board of Health within the meaning of the said statute, and due from, and payable by, them before the said 27th day of December, A. D. 1856, and not within six months of the date of the said writ of mandamus, and of the time when the said rate or rates which the said Local Board of Health are commanded to make might and could have been made."

Demurrer to the replication. Joinder in demurrer.

Garth, for the prosecutors.—The question here depends on the construction of The Public Health Act, 1848. By sect. 86, the Local Board is to defray the expenses of one species of works by a special rate. By sect. 87, the expenses of other things are to be defrayed out of the general district-rate. It is not material on this mandamus by which kind of rate the debt due to the prosecutors is to be defrayed; but it is material to show that it is a charge to be defrayed by one or the other. The first part of sect. 89 enacts: "that the Local Board may make and levy the said special and general district-rates, or any or either of them, prospectively, in order to raise money for the payment of future charges *910] and expenses, *or retrospectively, in order to raise money for the payment of charges and expenses which may have been incurred at any time within six months before the making of the rate." The first part of the return, and the plea, replication and demurrer to it, raise the question whether in this case the *charge*, for which the Local Board are required to make a rate, had been incurred more than six months before 12th June, 1857, the date of the writ; if it had, the Board could not lawfully make the rate; if it had not been incurred so long, the Board could make the rate. On the record it appears that the original debt was due more than six months before the writ, and the prosecutors, being unable to obtain payment, commenced an action. That action was compromised by taking, under a Judge's order, a smaller sum, for which judgment was signed on 15th July, 1856, more than six months before the date of the writ, but with a stay of execution till 27th December, 1856, which is less than six months before the date of the writ. The point, therefore, is whether a charge was incurred, within the meaning of the Act, on the 27th December, the day on which it first became possible to issue execution. The prosecutors could not have any remedy by mandamus to enforce the levying of a rate until they had obtained judgment and exhausted their ordinary remedies. [Lord CAMPBELL, C. J.—If the Local Board had power, on behalf of the rate-payers, to consent to this Judge's order postponing execution till 27th December, it certainly seems a new charge. But the effect of postponing the charge from 16th July to 27th December may have been to shift the burthen from one set of rate-payers to another. Had the Local Board authority to do that?] They have, under sect. 85, a general *911] power *as to the mode in which they make contracts, under which they might, in the first instance, make any reasonable arrangement as to the time when the price should be payable; and they have

express power to compound with a contractor for his benefit by remitting a penalty: it would be strange if they could not compound with him for the benefit of the rate-payers. And there is no need for express provisions to give them such a power; it is incidental to their general power as managers of the transactions.

Hugh Hill, for the defendants.—There is a mistake in treating this judgment as a charge within the meaning of that word, as used in sect. 89. Sect. 11 specifically charges certain things on the rates; and there are in other sections charges upon the rates. Those are meant by the word “charges,” in sect. 89: a debt due to a contractor is included in the word “expenses.” Such expenses must be paid within six months after they are incurred; and the Local Board has no power to convert them into a charge. [CROMPTON, J.—According to that argument, if a Board dispute a demand, and can by legal steps or otherwise delay judgment against them for six months, they deprive the creditor of all remedy.] Only of this remedy by levying a rate. Execution may still go against the property of the Board. [WIGHTMAN, J.—On the 21st of June, 1856, when the writ issued, the money was due, and the Local Board had no defence. If they had then suffered judgment by default, as they ought to have done, they might have been compelled to make a rate then. The creditor ought not to suffer because the Board defend the action. The period during which he may compel them to make a rate must run from the time when, by reasonable diligence, [*912 he could obtain judgment.] It may be so: but here they, by agreement, postpone the time of payment from July, when the judgment was signed, to December. A rate made at the time of the issuing of this writ would fall on a different class of rate-payers from those who would bear a rate made within six months after July, 1856. Those rate-payers object to this, and say that the statute gives the Local Board no power to cast the burthen upon them. The Local Board could not directly make a rate in June, 1857, to satisfy a judgment signed in July, 1856: can they indirectly do so by agreeing that execution shall be delayed for some months? [WIGHTMAN, J.—If, in the contract with the prosecutors, it had originally been stipulated that the price should be payable on the 27th December, 1856, it would have produced the same effect. Would such a stipulation have been ultra vires?] No; for the Act gives a discretion to the Local Boards as to the terms on which they may make contracts; but no discretion at all is given to them as to the period within which they may levy rates.

Garth, in reply.—On this record it is to be taken that the prosecutors were guilty of no laches, and that the 27th December was the earliest time at which they would practically obtain power to levy their debt. It might be a different case if the terms on which judgment was signed delayed the power to issue execution to a later period than that at which, by reasonable diligence, it might have been obtained. And, till the prosecutors had exhausted all other means to levy their debt, they were not in a position to apply for a mandamus to make a rate.

*Lord CAMPBELL, C. J.—I think that the prosecutors are [*913 entitled to judgment. I am clearly of opinion that, under sect. 89, the Local Board may be compelled to make a rate for the purpose of satisfying a judgment within six months after the judgment has been obtained. They may make a rate to pay for expenses within

six months after they become due; if an action is brought then, but judgment cannot be obtained till six months have elapsed, it cannot be that the creditor would be deprived of his remedy by the delay. The judgment must be a charge within the meaning of sect. 89. But then arises the question whether the agreement made in this case and sanctioned by a Judge's order, postponing the actual payment of the judgment-debt, is within the powers of the Local Board. On the whole I think it is valid, and within their powers. They might originally, in the contract itself, have agreed that the payment should be postponed to this time if they had then thought it for the benefit of the district; and I think they may do the same thing by this subsequent arrangement, if it is a fair and reasonable arrangement, and for the advantage of the rate-payers, which in this case it appears to have been. The prosecutors could not, by any practicable means, have obtained power to levy the debt sooner than they did. Had the judgment itself been obtained on the 27th of December, it would then have been a charge on the rates within the meaning of sect. 89; and I think that the arrangement which was come to was in effect the same thing as if the judgment had been then obtained.

(COLERIDGE, J., was absent.)

*914] *WIGHTMAN, J.—The Local Board might, by the original contract, have made the price payable on some day after the works were completed; and I see nothing to limit the time to which they might thus postpone payment. The arrangement come to in this case does the same thing in effect; and under the circumstances it was quite fair and reasonable so to do. The judgment which was signed in July, if execution might then have been issued, would then have been a charge within sect. 89, whether it could be called an expense or not. But it is said that the arrangement by which execution was not to issue till December was an unauthorized delay, transferring the burden to a different set of rate-payers. But it seems to me that a transfer of the burden, to such an extent and in such a manner as this arrangement entails it, is not objectionable, and that the arrangement was valid.

(CROMPTON, J., not having heard the whole argument, gave no opinion.)

Judgment for the Crown.

*915] *The QUEEN v. CHARLES TATHAM.

(Ex parte HORNSEY Local Board of Health.) Jan. 28.

Under The Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), the Local Authority in a district who have rendered innocuous a drain passing through their district, conveying away the filth of houses in a higher district, have no power to assess the owners of those houses for payment of the expenses, though those houses use this drain. The power of assessment of a Local Authority is confined to property within the district for which they act.

HAYES, Serjt., in this Term, obtained a rule calling on the defendant and four justices for the county of Middlesex to show cause why the justices should not issue their warrant to enforce payment of a special assessment made on the house and premises of the defendant by the Local Authority of the parish of Hornsey.

From the affidavits on both sides it appeared that several houses are

situated near the boundary between the parish of St. Pancras and the parish of Hornsey, some in one parish and some in the other. An ancient drain went down from St. Pancras through Hornsey past these houses, and was used by them as a sewer. It had been for some years arched over as far as a spot some little way below the boundary of St. Pancras parish, and was no nuisance to any one in St. Pancras; it continued to run down from that spot as an open ditch through the parish of Hornsey, and was a nuisance in that parish. The Local Authority of Hornsey arched over the open ditch in Hornsey, so as to convert it into a closed sewer, and thereby abated the nuisance. The sewage of the houses continued to flow through the arched drain in Hornsey as it had formerly flowed through the open ditch. A special assessment was made by the Local Authority for Hornsey on these houses as using a certain ditch, gutter, drain, sewer, and other structures lately constructed by the Local Authority of *Hornsey. The owners of such of the houses as were in St. Pancras refused payment, [916 on the ground that the Local Authority in one district had no power to assess premises situated in another. A summons for a distress warrant was taken out against the defendant as the owner of one of those houses in St. Pancras; but the justices refused to issue their warrant, on the ground above stated.

Stammers now showed cause.—The question depends upon the construction of The Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), and mainly upon sect. 22: "Whenever any ditch, gutter, drain, or watercourse used or partly used for the conveyance of any water, filth, sewage, or other matter from any house, buildings, or premises is a nuisance within the meaning of this Act, and cannot, in the opinion of the Local Authority, be rendered innocuous, without the laying down of a sewer, or of some other structure along the same or part thereof, or instead thereof, such Local Authority shall and they are hereby required to lay down such sewer or other structure, and to keep the same in good and serviceable repair;" "and such Local Authority are hereby authorized and empowered to assess every house, building, or premises then or at any time thereafter using, for the purposes aforesaid, the said ditch, gutter, drain, watercourse, sewer, or other structure, to such payment, either immediate or annual, or distributed over a term of years, as they shall think just and reasonable, and, after fourteen days' notice at the least, left on the premises so assessed, to levy and collect the sum and sums so assessed in the same manner, and with the same remedies in case of default in payment thereof, as highway-rates are by *the law in force, for the time being, leviable and collectable, and with the same right and [917 power of appeal against the amount of such assessment reserved to the person or persons so assessed, as by the law for the time being in force, shall be given against any rate made for the repairs of the highways; and the provisions contained in this section shall be deemed to be part of the laws relating to highways in England: Provided always, that where such ditch, gutter, drain, or watercourse shall, as to parts thereof, be within the jurisdiction of different Local Authorities, this enactment shall apply to each Local Authority only as to so much of the works hereby required, and the expenses thereof, as is included within the respective jurisdiction of that Authority: Provided also, that such

assessment shall in no case exceed a shilling in the pound on the assessment to the highway rate, if any." It is under this section that the assessment is made; but, being made upon houses out of the district for which the Local Authority acts, it is a nullity. [Lord CAMPBELL, C. J.—Do you go so far as to say that in no case could a house out of the district be assessed? We may suppose one house only situated in St. Pancras, just above the boundary, so that the mouths of its drains opened into the ditch just in Hornsey, and that this house was the sole cause of the nuisance: could it not be assessed?] Not even in that extreme case; the Local Authority have *ex vi terminorum* but a local jurisdiction. And this is reasonable; for the owners of property in one district have no voice in the election of the Local Authority in another, and ought not to be taxed at their option. [WIGHTMAN, J.—The Local Authority have no option. By sect. 22 they are required to *918] lay down a structure if the sewer is a nuisance. *CROMPTON, J.—But that is to be done only if in the opinion of the Local Authority it is necessary. Those who are to be bound by the opinion of a Local Authority ought to be those who have a voice in electing it.] That is the general scheme of the Act, as is shown by sect. 6, where it is necessary to provide for extra-parochial places. And sect. 22 itself shows it; the assessment is to be levied as highway-rates are, which are themselves local. The first proviso limits the jurisdiction as to the nuisance itself to the locality. St. Pancras is to make good so much of the nuisance as lies within its district, and, as it happens, has done so long ago. The last proviso shows that it was contemplated that the assessment should be on property subject to the same highway-rate: the assessments to the highway-rates for St. Pancras and Hornsey may differ; and then an assessment at 1s. in the pound on houses partly in one district, partly in the other, must be unequal. Besides, it does not appear that the houses in St. Pancras use this structure; they use the old drain, which has been arched over, but receive no benefit from the structure.

Hayes, Serjt., in support of his rule.—The only question is whether houses, using a sewer in an adjoining district, are assessable. [Lord CAMPBELL, C. J.—How do you show that they used this sewer? It seems that the covering in of the old ditch gave them no benefit. WIGHTMAN, J.—It would seem that, if those houses use this sewer, it would be equally true if there was a covered drain of miles in extent, and the houses were situated at the extremity of it many miles off.] The distance would only affect the question of fact, whether they did use it *919] or not. The scheme of the Act is that, *where a nuisance is to be abated, those who occasioned it are to bear the burthen; this appears by sect. 12. And accordingly, by sect. 22, the assessment is to be, not upon the property benefited by making the sewer, but upon the property using it. The houses locally situated in Hornsey using this ditch as a sewer, and so creating a nuisance, though they may not be incommoded by the nuisance, are to bear the burthen of abating it; why not those similarly situated out of Hornsey? The words of sect. 22 authorize the Local Authority "to assess every house," &c., using the sewer; there is no reason for reading the section as if the words had been "every house," &c., "situated within the district for which such Local Authority acts." There is nothing in the second proviso at all

inconsistent with this argument. The persons who feel the nuisance are to decide whether it shall be abated; those who occasion it are to pay. [Lord CAMPBELL, C. J.—But how do you meet the argument from this second proviso? The assessments to the highway-rate in St. Pancras and in Hornsey may be, and probably are, different. Which is to limit the assessment?] Each house is to be rated according to the assessment in its own parish. [Lord CAMPBELL, C. J.—But it is one assessment on all the houses; and it must be equal. Can you make it so if you take different limits?]

Lord CAMPBELL, C. J.—I am of opinion that this rule must be discharged. What we have to determine is the validity of this assessment. It can be supported only under the 22d section: the other sections referred to have so remote a bearing on the question that I do not think it necessary to notice them. First, I have *doubts whether it is [§920 made out that the houses used the sewer within the meaning of the section. The sewage from them flowed down to an open ditch where it was a nuisance, but no nuisance to them. That ditch is now covered up; and the sewage flows through it as it formerly did. I do not see how the situation of these houses is improved at all; and, if they are to be considered as using the covered ditch, the argument might go to make property liable for the expense of covering in an open ditch many miles distant. But my decision is not grounded upon this. I think that, assuming that the drain is used by these houses within the meaning of the Act, still no authority is given by the Act to assess them. We must construe the Act as it is, without inquiring what it ought to be. Now I see nothing to give power to the Local Authority to assess property lying out of their district. On the contrary, the first proviso seems to me to show that the Legislature intended to confine the assessment to the expenses of that part of the drain in its own locality. And that parochiality was in contemplation, however inconvenient it may be, is shown by the last proviso. My brother *Hayes* is one of the most ingenious of mankind; yet he was not able to suggest how that proviso could be made to apply if the assessment was on property in two districts. It is one assessment; and the rate must be equal. Now, if the assessments to the highway-rates in two districts are not the same, how is an equal rate to be made under this proviso? If the assessment is confined to one district all difficulty vanishes. And I am of opinion that such is the construction of the Act. Whatever inconvenience may arise from this, if of sufficient practical importance, must be remedied by the Legislature.

*(COLERIDGE, J., was absent.)

WIGHTMAN, J.—This is an assessment on several houses. As [§921 I understand the facts, the drain itself had existed long before the Act; and it had been covered over as far as the district of St. Pancras extended, and was no nuisance there. The Local Authority in Hornsey have not made a new drain; but they have covered in the old drain, so as to come within sect. 22; not as having made the drain, but as having made a structure along part of the drain. One very important question is, whether these houses use this structure within the meaning of the Act. They certainly in one sense use the drain: but the drain was not made by the Local Authority of Hornsey; and these houses derive no benefit from the structure which stopped the nuisance. It seems to me

that on that ground the rule ought to be discharged. But, further, the Local Authority is not empowered by this Act to assess property lying in another district. I attach a good deal of importance to the proviso as showing this, especially to the second proviso; by it the limit of the rate is to be "a shilling in the pound on the assessment to the highway-rate, if any." Now, if the property is in two districts, which highway-rate is to be the criterion? There must be one limit to the one assessment; but the highway-rates in the two districts may be different. It seems to me that the proviso indicates that the Legislature did not contemplate that the assessment could be on property in any district save that of the Local Authority.

CROMPTON, J.—I also think that the rule ought to be discharged, on *922] the ground that the Local Authority are *not empowered to make an assessment on property situated out of their district. *Prima facie* a local body, having a jurisdiction limited as to area, is to be assumed to have authority to act within that area only. It is not expressly said in sect. 22 that the powers of the Local Authority there given are to be exercised within the area of their district only; but express words are not necessary to impose such a limitation. There is much practical reason for not making the areas of the district too small; for, on the boundaries, each district derives some benefit from sanatory works in the adjoining districts. But, though this is the case, I think it could not be the intention of the Legislature to give powers to the Local Authority, elected by the inhabitants of one area, to impose taxation on those out of the area. And the provisos in sect. 22 are strong to confirm the view that this was not the intention of the Legislature. I think the proviso as to the limit of the assessment especially shows this. You must impose a different limit in the different districts according to the highway-rate in each; which cannot be, for the assessment must be uniform: or you must limit the assessment in the district which has the highest highway-rate, by making it not exceed the limit in that which has the lowest. There would be no injustice in that last scheme; but then it is not in the Act. It would be necessary to introduce words for that purpose. I think, therefore, the assessment invalid.

Rule discharged.

*923] *BETTS v. MENZIES and WILDEY. Jan. 29.

In an action for an infringement by defendant of plaintiff's patent, the defendant, to prove that plaintiff's patent was not new, produced an earlier specification of a patent taken out by D., and contended that, upon a comparison of the two specifications, it appeared that the plaintiff claimed as new a method described in D.'s specification. No user of D.'s patent was shown. The judge asked the jury whether a person of ordinary skill could, from D.'s specification alone, make the thing produced by plaintiff's patent: and they having answered in the negative, he directed a verdict for plaintiff.

Held, a misdirection: inasmuch as D.'s specification might insufficiently describe the process, even so as to make the specification bad, and yet might disclose enough to show that what was claimed in plaintiff's specification was not wholly new.

DECLARATION for infringement of a patent for a new manufacture of capsules, and of a material to be employed therein, and for other purposes. The count contained the usual allegation as to the specification.

Pleas: 1. That plaintiff was not the true and first inventor of the said supposed new manufacture in the declaration mentioned, as alleged.

2. That the said supposed invention in the declaration mentioned was not a new manufacture, as alleged.

3. Denial of the grant of the letters patent.

4. Denial of enrolment of any instrument particularly describing, &c.

5. Not guilty.

Issues on all the pleas.

On the trial, before Lord Campbell, C. J., at the Middlesex Sittings after Trinity Term, 1857, it appeared that the plaintiff's specification, dated 13th July, 1849, and enrolled the same day, was for an invention entitled "A new manufacture of capsules, and of a material to be employed therein, and for other purposes." The invention was described as follows.

"The capsules herein referred to are metal covers, used for closing or stopping, or for securing the closure *or stoppering of the mouths [*924 of bottles and certain other vessels, which metal covers have been hitherto made of tin, by bending up a suitable piece of a thin sheet of that metal into a hollow form, or cup, or cap, of a suitable size for applying closely over the mouth of a bottle or other vessel, and over any such cork or other kind of stopper as may have been previously inserted into the said mouth. In case of a cork or other stopper being used, the sides of the said metal cover, cap, or capsule also reaching downwards around the outside of the upper part of the neck of the bottle, so as to envelope the whole of such upper part, in the manner of an inverted cup, or of a case, or hood, or cap, or metal cover, or capsule, the said sides hereof, after having been so applied over and around the said upper part, are closely collapsed or closed in, or compressed laterally on all sides around that said upper part, in such manner as that the said metal cover, cap, or capsule will become securely fastened around and upon the said upper part, suitably for closing or stopping, or for securing the previous closure or stoppering of the said mouth of the bottle or other vessel, in such manner as that the said mouth cannot be opened without cutting or tearing the metal, and manifestly disfiguring the metal cover, cap, or capsule. Metal covers, caps, or capsules, made of tin, are well known under the designation of 'Bett's Patent Capsules,' and are now in common use, great numbers having been made and sold under certain letters patent, granted at three several times by Her present Majesty to my late father, John Thomas Betts, namely, on," &c. (dates of the three patents, the second being of 16th March, 1848). "The new manufacture of a material to be employed in the manufacture of capsules, and for other *purposes, consists, in combining lead [*925 with tin, by covering the lead with tin over one or both surfaces of the lead, and reducing the two metals in their conjoined state into thin sheets, of a thickness suitable for the purposes to which they are to be applied. And for the purpose of so preparing lead by covering the same with tin as aforesaid, I first cast the molten lead in an ingot mould of cast iron (or other suitable material), and constructed in the usual manner of ingot moulds for metal, and of suitable internal dimensions for producing ingots of lead, which (for the manufacture of the material for capsules) may be between four and five inches wide by about three-quarters of an inch thick, and about thirty inches in length, with

a few inches at one end of each ingot gradually reduced in thickness, in the manner of a wedge. I also cast tin, either into similar ingots, of the same or nearly the same dimensions as the aforesaid ingots of lead, or the tin may be cast into long thin strips, of nearly the same width as the aforesaid ingots of lead, and between one-quarter and one-sixteenth of an inch in thickness, and several feet in length. And having thus obtained the lead and the tin in suitable states for beginning the rolling or laminating each of the two metals separately between a pair or pairs of revolving cylindrical flattening rollers, of the construction usually employed for rolling or laminating ductile metals, I pass and repass the lead one or more time or times through or between such rollers, that is to say, rolling and re-rolling the ingot of lead as many times as may be requisite for reducing the lead to about one-fourth of an inch in thickness, and thereby the ingot of lead will become greatly elongated. And in like manner I roll and re-roll the tin as many times as (according to *926] its original thickness when cast as aforesaid) may be requisite for reducing it to about one-twentieth part of the thickness to which the lead is reduced by rolling as aforesaid, whatever that thickness may be. The lead and the tin having been thus reduced to their proper relative thicknesses, and their widths being nearly alike, and even surfaces of each of the two metals having been obtained by the aforesaid rolling, then, in case it is intended to cover both sides of the lead with tin, I extend a long strip of the thin tin (so reduced to relative thickness as aforesaid) flatways upon a smooth table, and lay a shorter strip of the lead (so reduced to relative thickness as aforesaid), very evenly upon the extended tin, with one end of the said strip of lead conforming with one end of the said long strip of tin, and then I fold back the tin over the other end of the lead (being that end thereof which still retains some of that wedge-like form of the original casting of the ingot of lead already mentioned), and, consequently the tin when so folded will apply to both surfaces of the lead; I then cut off the long strip of folded tin to correspond with the length of the lead, and I smooth down the tin with any convenient wooden rubber, or otherwise, so as to take out all wrinkles in the tin, and bring it very evenly into superficial contact with the lead, and with the two bordered edges of the strip of tin, conforming everywhere with the two bordered edges of the lead, so as to insure that the tin shall cover the lead as completely as can be done; I then take up the lead and tin together from off the said table, and present the folded end of the tin to a pair of revolving flattening rollers, which are set so as to subject the two metals to a very considerable pressure, and that pressure, at the same *927] time that it reduces the thickness and elongates the two metals, will also cause their surfaces to adhere together, and then I repass the conjoined metal again and again between the said rollers for further reduction and elongation, and at every succeeding time of so repassing the adhesion of the two metals will become more complete, and when the strip of conjoined metals is thus become elongated to a considerable length, I find it is convenient, for further repetitions of the rolling, to gather up the said strip (as fast as it comes out from between the said pair of flattening rollers) into a spiral coil, by means of a roller which is suitably disposed behind that pair of rollers, and is turned round by an endless strap motion, so as that the said roller will wind and

coil up the strip around it into such a coil; and then that roller, with the said coil thereon, can be removed to the front of another pair of flattening rollers, which by their motion will draw off and unwind the strip from its said spiral coil as fast as the conjoined metal passes through between the said flattening rollers, which rollers should be made of hard cast iron, in the manner of what are called chilled rolls, and highly polished, in order to give a very smooth surface to the tin of the conjoined metals by the rolling or flattening action of the said pair of flattening rollers. And note, I provide a small cistern of water beneath the said roller, which has the said coil around it, so that when the same is removed to the front of the pair of flattening rollers, as aforesaid, the lower part of such coil will be immersed in the said water, in order that the conjoined metal may become wetted on its surfaces before it enters between the said pair of flattening rollers; and such wetting tends to prevent the tin on the surface of the conjoined metal from adhering to the rollers, as it might otherwise do *occasionally. And I repeat such rolling of the strip of conjoined metals between the same or [928 another like pair of chilled and highly-polished flattening rolls, two, three, or more times, as may be requisite for reducing the said strip of conjoined metals to the required thinness for the manufacture of capsules. The material so prepared is cut into discs or pieces of the required size. These discs are then carefully examined, for the purpose of rejecting any in which the lead is not perfectly covered by the tin, which will be at once discovered in a good light, from the difference of appearance of the surface where the lead is not perfectly covered. The discs of the said new material are made into capsules, and the manufacture thereof conducted in the manner described in the specification of the said letters patent of the sixteenth day of March, one thousand eight hundred and forty-three, and which process is now well understood. The said new material or compound metal of lead combined and covered with tin on one or both sides in manner aforesaid, may also be employed for other purposes; such, for instance, as for making into very thin sheets, as a substitute for what is called tin foil, and which has been hitherto made (or professed to be made) of tin alone, but has been more commonly made of tin alloyed with lead, by mixing those two metals together, whilst both are in a state of fusion, in the first instance, before casting the mixed metal into ingots, whereas my new material will be pure tin on the surface exposed to view, but will be lead in its interior thickness; and the said pure tin on those surfaces, being unalloyed by the lead which it covers over, will exhibit a brilliant metallic lustre. And when my said new material is to be made into thin leaves or foil, which will *serve as a substitute for tin foil, I take a long strip of the conjoined metal, which has been already rolled and reduced in [929 manner hereinbefore described, and I fold such strip several times upon itself, of a length equal to the width of the foil required, and then, by cutting off the two folded ends, I obtain a packet consisting of between two and three dozen strips, but all alike, and I pass and repass such packet repeatedly through between a pair of highly-polished flattening rollers, with the lengthway of the said packet parallel to the axis of the said rollers, so that the rolling and laminating action thereof will be transverse to the direction of the previous rolling of the long strip, and by repeated rolling and re-rolling such packet of strips transversely they

are reduced in thickness and extended in width by degrees, so as to become broad leaves of thin foil; but during the progress of such repeated rolling and re-rolling I occasionally separate the leaves one from another, to prevent any adhesion that might otherwise take place between their adjacent surfaces. The thin leaves of my new material, after having been reduced very thin by rolling and re-rolling as aforesaid, may afterwards be still further reduced in thickness, if that is required, by hammering a great number of the thin leaves together on a flat table, in the usual mode of treating tin foil." The specification then added that the material might be employed for various purposes, in addition to those purposes for which tin foil had been commonly used; and that thin leaves of it might be ornamented by embossing with patterns as commonly practised, by passing the leaves between revolving rollers (which were described). And that thin leaves of the material might be *930] printed. That the embossing or printing would be very distinct *and well defined; and that the brightness might be preserved by varnish. That thin leaves of the material might be used in the manner of paper-hanging, or for ornamenting particular parts of walls. It then proceeded as follows. "And instead of the tin covering both sides of the lead, it will be sufficient for many purposes to have the tin upon one side only of the lead; for instance, when thin leaves of my new material are employed in place of tin foil, for lining dressing-cases, or other purposes requiring the leaves to be glued, pasted, or otherwise stuck upon any surface which is to be covered by the leaves; the aforesaid employment of such leaves for hangings of the walls of apartments being in another instance; or in case it may be required to stick such leaves down upon paper, or upon cloth, previous to or subsequent to embossing or printing upon the tin surface as aforesaid, or for covering or partly covering over the outsides of books, fire-screens, work, or other ornamental articles, in all or any such cases it will be unnecessary to have any tin upon that side which is to be so glued, pasted, or otherwise stuck. And the mode of proceeding, when only one side of the lead is to be covered with tin, is the same in all respects as hereinbefore described, except as to applying the tin to only one side instead of both sides of the lead at the time when a thin strip of tin is applied to a thicker strip of lead, as hereinbefore described, but that strip of tin should be folded back a short distance over that end of the lead which has the wedgelike form, and the folded end of the tin should be presented between the pair of revolving flattening rollers when the lead and tin together are to be subjected for a first time to the pressure of those *931] rollers, and make the two metals adhere together, *as already explained, for the said folded end of the tin around the wedge-like end of the lead will insure that the two metals will enter properly together between the rollers. And my said new material being made in plates or sheets of adequate thickness and size, may be employed for other purposes, for which thin sheet lead or tinned iron or sheet zinc or sheet tin have been commonly employed, such, for instance, as lining cisterns or wine-coolers, which are to contain water, and for lining boxes, chests, or cases for packing or safe keeping of articles which require to be kept dry or protected from insects; or on a still larger scale for lining larger water-cisterns, and other purposes, in substitution for the thicker sheet lead used by plumbers. In most such cases it will be suffi-

cient to have one side only of the lead covered with tin. And the perfection of my said new material will depend in a great measure upon the soundness of the casting of the tin in the ingots to avoid specks of sand or dirt flaws or honeycomb hollows in the ingots; and the same, in some degree, of the lead, for as the conjoined metals are to be very much extended in the operations of laminating, and the tin on the surface or surfaces will be reduced extremely thin by those operations, any minute defects in the soundness of the castings will become extended, so as to cause visible blemishes in the tin surfaces of the conjoined metals; hence, the casting of the ingots should be conducted with every care and precaution commonly practised for obtaining soundness; and the same of the laminating operations, and, in particular, care should be taken to avoid dirt getting between the tin and the lead when they are pressed together for the first time between the pair of flattening rollers, for obtaining the first adhesion *of the two metals; also, any air [*932 which cannot make its escape from between them will remain imprisoned, so as to form blisters, which will render the adhesion imperfect at the places of such blisters. To avoid blisters, the tin should be carefully smoothed down upon the lead, as already mentioned, without leaving wrinkles containing air, of which portions may get imprisoned; and the surfaces of the said pair of rollers, between which the lead and the tin are passed together for the first time as aforesaid, should move with a slower motion than is suitable for the other pair or pairs of rollers between which the subsequent lamination of the conjoined metals is to be performed, after their adhesion has been produced by repeated operation, the first-mentioned pair of rollers, the slower motion of which will better allow the air to make its escape from between the lead and the tin. The fragments of my new material left unworked into capsules, or otherwise beneficially employed, are carefully reserved for melting down along with lead for casting future ingots, which will thereby acquire a very small proportion of tin, but not enough to make any material difference from pure lead. I am aware that it has been proposed to cover lead with tin, by applying the tin, when in a state of fusion, to the lead when adequately heated, so that the adhesion of the two metals would be produced by agency of heat with complete fusion of the tin; but the adhesion of the two metals in my new material is produced by agency of mechanical pressure. And I wish it to be understood that I do not claim the exclusive use of the several purposes(a) hereinbefore described or referred to of casting, cutting, and rolling, except when the same are employed *for the purposes of my said [*933 invention; and I hereby declare that I claim as the invention intended to be secured by the said letters patent,—

“Firstly, the manufactures of the new material, lead combined with tin, on one or both of its surfaces, by rolling or other mechanical pressure, as herein described.

“Secondly, the manufacture of capsules of the new material of lead and tin combined by mechanical pressure, as herein described.”

For the purpose of showing that the patent was not new, the defendants produced the specification of a patent granted to Thomas Dobbs, dated 10th September, 1804, and enrolled 12th September, 1804. It

(a) Sic, in the printed copy. *Quare*, “processes?”

was entitled an invention of "A new article of trade, which I denominate Albion Metal, and which I apply to the making of cisterns, linings for cisterns, covering and gutters for buildings, boilers, vats, coffin furniture, worms for distillers, and such other things as require to be made of a flexible, a wholesome, or a cheap metallic substance." And Dobbs did thereby "declare that my said invention consists in plating, coating, or uniting lead with tin, and also their various alloys or mixtures, as the case may require, which, when done, I denominate Albion Metal, and which I apply to the manufacturing of cisterns, linings for cisterns, covering and gutters for buildings, boilers, vats, and linings, coffin furniture, worms for distillers, and such other things as require to be made of a flexible, a wholesome, or a cheap metallic substance.

"The operation of coating or plating lead with tin, or coating or plating alloyed lead with tin, or with alloyed tin, to make Albion Metal, I perform by various methods, as hereafter described; that is to say, I take a plate or ingot of lead, or alloyed lead, and a plate of tin *934] *or alloyed tin, of equal or unequal thickness, and laying them together, their surfaces being clean, pass them between the rollers of a flattening or rolling mill with what is technically called a hard pinch, so as to make the metals cohere. If after the first passage of the plates or pieces of metal between the rolls the plates or pieces do not sufficiently cohere, I pass them a second or third time or more between the rolls, until a sufficient degree of cohesion is produced.

"N. B.—It will be useful, if not necessary, to have the rolls and the metals hot when the cohesion of the metals is to be effected by their passage between the rolls, especially when the alloyed pieces or plates are used. When lead or alloyed lead is required to be coated or plated on both sides with tin or alloyed tin, I apply a plate of tin or alloyed tin on each side the plate or piece of lead, or alloyed lead, and pass them between the rolls of a mill under the circumstances aforementioned: or the same may be effected by taking a plate which is already coated or covered on one side with tin, or alloyed tin, which I double with the lead side inwards, and pass it through the rolls, as before described, to obtain the proper degree of cohesion. I also make Albion Metal by the following method:—I cast a plate or ingot of lead or alloyed lead, and as soon as it is set or congealed I cast tin or alloyed tin upon it, or under, or on all sides of it, which will cohere with the piece of metal first cast, and the Albion Metal thus prepared may be wrought or flattened, by the usual means of rolling, hammering, or pressing."

It appeared that there had been no actual user of metal made from Dobbs's patent: but the defendants relied upon the comparison of the *935] two specifications as *showing that the plaintiff's process was not new. Evidence was given on both sides as to the practicability of producing a result like that from the plaintiff's patent by following only the instructions given in Dobbs's specification. The Lord Chief Justice told the jury that the first question was, Whether by the specification of Dobbs, or anything done under it, there was made known to the world the process in the specification of the plaintiff: and that he therefore first asked them to say: Whether the process described in the plaintiff's specification was described in the specification of Dobbs, or was ever practised under it: and, the jury having hesitated for some time, he finally asked them whether they thought that a person of ordi-

nary skill, reading Dobbs's specification, and having no other information upon the subject, could at once proceed to make Betts's metal, not making experiments and getting on bit by bit, but whether Dobbs's specification stated enough to enable such a person at once to sit down and make Betts's metal. The jury having answered this question in the negative, the Lord Chief Justice directed them to find for the plaintiff on the issues upon the first and second pleas. The plaintiff had also a verdict on all the other issues.

In last Michaelmas Term, *Montague Smith* obtained a rule calling on the plaintiff to show cause why a verdict should not be entered for the defendants (on a ground not now material), or why a new trial should not be had "on the following grounds: First, that plaintiff's invention, as claimed, was included in the specification of Thomas Dobbs's patent granted in 1804; and that the Judge ought so to have directed the jury; Second, that the questions left to the jury upon which their verdict *was to depend on the issues of novelty were too limited and [*936 erroneous; Third, that the question left to the jury as decisive [936 on the question of novelty, viz. whether a person of ordinary skill, reading Dobbs's specification and having no other information upon the subject, could at once proceed to make Betts's metal, was too limited and erroneous, and especially when further limited to making Betts's metal applicable to capsules; Fourth, that the direction given by the Lord Chief Justice to the jury, in answer to the questions put by them, was too limited; Fifthly" (a ground not now material); "Sixth, that the verdict was against the evidence on the ground of the manufacture claimed by the plaintiff not being new, and being included in the prior patent of Dobbs of 1804."

On a previous day in this Term, (a) and on this day,

Sir *F. Kelly*, *Macaulay*, *Udall*, *T. Webster*, and *C. Milward* showed cause.—The test finally submitted to the jury was a fair one. The defendants relied entirely on Dobbs's specification: the question therefore was, whether that specification described what was specified under the plaintiff's patent. To decide this, it was necessary to determine what Dobbs's specification did disclose: and, for this purpose, the ordinary test of a specification was properly applicable, namely, Whether it disclosed enough to enable a workman of ordinary skill to produce the result from the specification alone. (The argument on the other points is omitted.)

Montague Smith, *Hindmarsh*, and *Joseph Brown*, contra, were not called on to support the rule.

*Lord CAMPBELL, C. J.—I think there should be a new trial, [*937 on account of the mode in which the point was left to the jury. [937 The way in which I at first left it to the jury was, I think, right: Whether, by Dobbs's specification, or anything done under it, the process described in the plaintiff's specification was made known. On this the jury deliberated for some time: but they must be considered to have been guided by what I said afterwards. Now I think that, though a mode of coating the lead with tin was disclosed in each specification, yet, if the plaintiff's specification described a new *modus operandi*, that would be a proper subject for a patent. It does appear, by the plaintiff's

(a) February 16th. Before the same three Judges.

specification, what his *modus operandi* was: by that he made his metal available in fact; and that would be the subject of a patent if not before disclosed. But I think that the test which I finally proposed was defective, namely, whether a workman of ordinary skill could, from merely reading Dobbs's specification, make the plaintiff's metal. That was a proper test only upon the question whether Dobbs's specification was good or bad: no doubt, if the question were answered in the negative, that would show the specification to be bad. But the specification might be bad, and yet might disclose enough to show that what the plaintiff specified was not a novelty.

(COLERIDGE, J., was absent.)

WIGHTMAN, J.—I am of the same opinion. The question put at first was unexceptionable: but that finally put might mislead the jury. The test proposed might be a good one, if the question were whether Dobbs's *938] specification was good. But it was not a proper *test on the question of the novelty of the plaintiff's patent: and on that single ground I think there ought to be a new trial.

CROMPTON, J.—I am of the same opinion. Many important questions may be raised hereafter on the other points. But I think that the test finally put was not the right one. The question on which the point arises was, whether the invention described in the plaintiff's specification was new. The defence, as to this, rested on the specification of Dobbs's patent. So the question for the jury was, Whether all that the plaintiff's specification claimed was new, notwithstanding the previous specification of Dobbs. If anything claimed in the plaintiff's specification was to be found in Dobbs's specification, the plaintiff would fail, though Dobbs's specification was bad. I think that was the proper question to leave to the jury. If Dobbs did not, in his specification, sufficiently describe the mode of producing the result, his specification might be bad, and yet the method described by the plaintiff not be new. On the other hand, Dobbs's specification might be perfectly good, and yet not disclose the method afterwards specified by the plaintiff: for instance, if the plaintiff took out a patent merely for an improvement on Dobbs's patent, each specification might be good. But the question put, whether an ordinary workman could, from Dobbs's specification alone, produce that which was produced by the process described in the plaintiff's specification, is not a conclusive test as to whether Dobbs's specification showed that something claimed in the plaintiff's specification was not new.

Rule absolute for a new trial.

In order to entitle one to a patent, under the laws of the United States, it is necessary that he should be not only an original inventor, but the first in point of time, and the patent will be void if he be not such in point of fact, though he may have believed himself to be so: *Evans v. Eaton*, 3 Wheat. 454. Where, however, a prior invention is set up to defeat a patent, the idea must not only have been conceived,

but it must have been reduced to a practical use. It is not sufficient that experiments have been made, if they have led to no actual result, and have never been prosecuted, though they may have suggested the patented invention: *Reed v. Cutler*, 1 Story 590; *Washburn v. Gould*, 3 Id. 122; *Mason v. Jagger*, 1 Blatch. C. C. 372; *Good-year v. Day*, 2 Wall. Jr. 283; *Allen v. Hanter*, 6 McLean 303; *O'Reilly v.*

Morse, 15 How. U. S. 62. Yet where the prior invention has been perfected, it is not material whether it has been actually used: *Parker v. Ferguson*, 1 Blatch. 407; *Washburn v. Gould*, 3 Story 122; *Reed v. Cutler*, 1 Id. 590.

In ordinary cases, and where the question is directly as to the validity of the patent itself, it is a question for

the jury to determine whether the description in the specification is clear enough to enable a mechanic of ordinary skill to construct the particular machine therefrom without other assistance: *Hogg v. Emerson*, 11 How. U. S. 587; *Wood v. Underhill*, 5 Id. 1; *Reutger v. Kanowrs*, 1 Wash. C. C. 168.

*The QUEEN v. FOX. Jan. 29.

[*939

A clerk to the justices of a borough, appointed under stat. 5 & 6 W. 4, c. 76, s. 102, holds only during the pleasure of the justices; and therefore an information in the nature of Quo warranto will not lie for his office.

Where a person is interested in the prosecution of parties committed for trial by the justices of a borough, this does not disqualify him from being appointed clerk to the justices; nor is the office avoided if, after such appointment, he becomes so interested. He is only liable, under sect. 102, as having acted illegally.

WELSBY, in last Term, obtained a rule calling on Charles Burton Fox "to show cause why an information in the nature of a Quo warranto should not be exhibited against him, to show by what authority he claims to exercise the office of clerk to the justices of the borough of Newport in the county of Monmouth, on the ground that he is, by his partner Mr. Prothero, interested or employed in the prosecution of offenders committed for trial by the justices."

In support of the rule it was deposed that the borough of Newport, in Monmouthshire, is one of the boroughs named in Schedule (A.) to stat. 5 & 6 W. 4, c. 76, and that a separate commission of the peace had been granted to it in pursuance of sect. 98, but not a separate court of quarter sessions in pursuance of sect. 103. That in 1845 the justices of the borough appointed Fox, who was an attorney and solicitor, clerk to the justices, in pursuance of sect. 102; and he had ever since continued to be and act, and still acted, as such clerk. That, from 1852 hitherto, Fox had carried on the business of attorney and solicitor in partnership with Charles Prothero, attorney and solicitor at Newport, under the style of Prothero & Fox. That Prothero was, in 1848, appointed clerk of the peace for the county of Monmouth, within which the borough of Newport is situate; and he had ever since acted as clerk to the county. That, as such clerk of the peace for the county, and for his services in the discharge of such duties, Prothero was paid by fees, and not by salary; that he received the usual fees, as clerk of the peace upon the prosecution of offenders committed by the justices of the borough for trial at the Quarter Sessions for the county, and, amongst others, the fee of 6s. 8d. on the arraignment, and 5s. for the trial, of every prisoner at such Sessions; and that he had for several years been, and still was, interested as aforesaid in the prosecution of prisoners so committed. That prisoners in custody within the borough for felonies and misdemeanours were committed by the justices of the borough for

trial at the county Quarter Sessions, and were accordingly tried at such Sessions; and Prothero, as such clerk of the peace, received his usual fees on the trial of such offenders. That Fox, being clerk to the justices of the borough, was, by himself or his said partner, directly or indirectly interested in the prosecution of the above-mentioned offenders, and had, for several years past, been so interested in the prosecution of other offenders committed by the justices of the borough for trial at the county Quarter Sessions. That the fees received by Prothero as clerk of the peace for the county (including those received by him on the trial of offenders committed by the justices of the borough for trial at the county Quarter Sessions) were either brought into account as part of the receipts or gains and profits of the said business of attorneys and solicitors carried on by Prothero and Fox, or, if they were secured by Prothero alone, for his own use, Prothero, by reason thereof, received a less share than he otherwise would of the gains and profits of the partnership. That, at a public meeting of the rate-payers of the borough on 16th February last, *941] it was determined to request the town council to *take proceedings to try the validity of Fox holding the appointment of clerk to the borough justices; which resolution was brought under the consideration of the council at their general quarterly meeting on 5th May last; and that the present application was made at the instance of the council.

In answer, Fox deposed that neither he nor Prothero were in any way directly or indirectly employed or concerned in the prosecution of such offenders; and that it had never been insinuated that any inconvenience had arisen from his relation to Prothero. His affidavit also detailed certain negotiations between the town council and the justices of the borough as to paying Fox by a salary: and it appeared that the town council had requested the justices to dismiss Fox; which they had refused to do. It also appeared that, on 30th May, 1857, an application had been made to this Court for a rule for a criminal information against Fox for holding the office; but this Court had then refused to grant such rule.

Sir *F. Thesiger* and *Phipson* now showed cause.—*Quo warranto* will not lie in this case. The defendant holds merely at pleasure. In *Darley v. The Queen*, 12 Cl. & Fin. 520, the House of Lords decided that the information would lie in the case of the office of Treasurer of the county of the city of Dublin. There *Tindal, C. J.*, delivering the opinion of the Judges, laid down the rule. "After the consideration of all the cases and dicta on this subject, the result appears to be, that this proceeding by information in the nature of *Quo warranto* will lie for usurping any office, whether created by charter alone, or by the Crown, with *942] the consent of Parliament, *provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others; for, with respect to such an employment, the Court certainly will not interfere, and the information will not properly lie:" 12 Cl. & Fin. 541. Now it appears from *Ex parte Sandys*, 4 B. & Ad. 863 (*E. C. L. R.* vol. 20), that "a clerk to justices has no legal hold upon his office; he is only appointed to assist the justices; it is an office during pleasure, like that of a vestry clerk." [*Crompton, J.*—He was there treated as a mere

servant to the justices.] Also, under sect. 102 of The Municipal Corporation Act, 5 & 6 W. 4, c. 76, the clerk to the justices is removable at their pleasure. In *Regina v. Guardians of St. Martin's*, 17 Q. B. 149 (E. C. L. R. vol. 79), it was held that the information will lie for the office of clerk to Guardians appointed under order of Poor Law Commissioners, he being elected by the Guardians, under a similar order, in pursuance of stat. 4 & 5 W. 4, c. 76, s. 46. In that case the tenure was for life, during sanity, or until resignation or order by the Commissioners: and there Erle, J., referred to the tests laid down in *Darley v. The Queen*. In *Rex v. The Justices and Treasurer of Herefordshire*, 1 Chitt. R. 700 (E. C. L. R. vol. 18), the information was refused in the case of a county treasurer. [Lord CAMPBELL, C. J.—On the assumption that the clerk holds illegally, what is the remedy?] The justices may remove him. [Lord CAMPBELL, C. J.—You say that we ought to presume that the justices will do their duty.] That is the argument. But, next, sect. 102 of stat. 5 & 6 W. 4, c. 76, does not make the holding illegal. The justices cannot appoint to the office “a clerk of the *peace of such borough, or the partner of such clerk of the peace, [*943 or any clerk or person in the employ of such clerk of the peace.” But Prothero, the partner of Fox, is clerk of the peace of the county, not of the borough. It is true that the section goes on to prescribe that “it shall not be lawful for the clerk to the justices, by himself or his partner, to be directly or indirectly interested or employed in the prosecution of any offender committed for trial by the justices:” but this does not avoid the office, but merely subjects the offender to a forfeit of 100*l.*, if indeed that penalty clause be applicable to the case of a clerk to the justices; which it appears not to be: *Coe v. Lawrance*, 1 E. & B. 516 (E. C. L. R. vol. 72). And, again, there is no offence committed in this case. Prothero is not employed in the prosecutions; nor is he or Fox directly or indirectly interested in them. Prothero has a fixed fee on the arraignment and trial: but the enactment was directed against conducting prosecutions. [CROMPTON, J.—If we were to oust Fox, I do not see what there is to prevent the justices from reappointing him.]

Pashley and Welsby, *contra*.—In *Regina v. Guardians of St. Martin's*, 17 Q. B. 149 (E. C. L. R. vol. 79), the clerk was removable at the will of the Commissioners, though, of course, the power would not be exercised without some reason; nor would it in this case. [Lord CAMPBELL, C. J.—There may well be a power of removal which does not make the tenure a holding at pleasure. Thus, the Lord Chancellor may remove a county court judge, but only for incapacity or misconduct; the office therefore is not held at pleasure.] In strictness, it might be said that a justice of peace *holds at the will of the Crown, or of the Lord Chancellor: yet the information would lie for the office. As to [*944 the next point, the effect of sect. 102 is that the justices could not legally appoint a person disqualified as the section describes. The interest clearly appears: a clerk has an interest in getting a party indicted, if he is to have a fee on the arraignment and trial, as much as if he were to be paid for conducting the prosecution.

Lord CAMPBELL, C. J.—The rule must be discharged. First, the office is held during pleasure. No words could more pertinently express this than the words in sect. 102. It is not an office to be held *quam*

diù se bene gesserit. The justices may remove their clerk without the slightest stain on his character, merely for the purpose of replacing him by a person whom they think fitter for the office. In *Darley v. The Queen*, 12 Cl. & Fin. 520, the officer was not removable at pleasure. The principles there laid down govern this case. But there is another conclusive objection against the rule. Fox was lawfully appointed; and nothing has occurred to vacate his office. The justices refuse to dismiss him. He is not disqualified for appointment, as the other parties named in sect. 102 are; namely, the aldermen, the councillors, the clerk to the peace of the borough, and his partner or any person employed by him. Having been lawfully appointed, even if he has violated the law, that only subjects him to punishment. I abstain from giving an opinion on the question whether his partner is directly or indirectly interested in the prosecutions.

(COLERIDGE, J., was absent.)

*945] *WIGHTMAN, J.—I am entirely of the same opinion. By the express terms of sect. 102 the clerk holds only during pleasure. And, further, his being interested in the prosecutions would not disqualify him, but only subject him to a penalty. There is nothing to show that, if he were ousted, he might not be immediately reappointed.

CROMPTON, J.—I am of the same opinion. The clerk is removable at pleasure; and Quo warranto will not lie for an office of such a tenure. I agree with what my brother Erle says in *Regina v. Guardians of St. Martin's*, 17 Q. B. 149 (E. C. L. R. vol. 79). The case of *Ex parte Sandys*, 4 B. & Ad. 863 (E. C. L. R. vol. 24), explains the nature of the employment; and it is pointed out in a note to Welsby and Beavan's edition of Chitty's Collection of Statutes(a) that the word "office" is not here used in its strict sense. The other objection is equally fatal. The application assumes that Fox is in the office; else Quo warranto would not lie. Then, how is the office avoided? The mischief is provided for in sect. 102, not by a disqualification, but by a penalty; for the facts suggested do not bring the case within the first part of the enactment, which disqualifies, but (if there be any offence, which I need not decide) only within the second, which merely imposes a penalty.

Rule discharged.

(a) Vol. 1, p. 853, note (c); and see p. 833, note (c).

*946] *HEALEY v. JOHNS. Jan. 30.

Under sect. 1 of The Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), a plaintiff who recovers judgment on a bill of exchange upon default of defendant's appearance is entitled to costs as there limited, though the sum recovered is less than 20*l.* and the action is within the jurisdiction of the City of London Small Debts Court, notwithstanding The London (City) Small Debts Extension Act, 1852 (15 & 16 Vict. c. lxxvii.), sects. 119, 129.

QUAIN, in last Term, obtained a rule calling on the defendant to show cause why the plaintiff should not recover his costs in this action, and why the same should not be referred to one of the Masters of this Court for taxation.

From the affidavit on which the rule was obtained it appeared that

the action was brought in this Court, under the provisions of The Summary Procedure on Bills of Exchange Act, 1855, to recover 15*l.* 13*s.*, due from defendant to plaintiff on a bill of exchange, drawn on and accepted by defendant, and endorsed by the drawer to plaintiff, dated 30th July, 1857, and payable three months after date. In default of appearance, judgment for plaintiff was signed on 19th November, 1857. Both plaintiff and defendant resided and carried on business in the city of London, and within the jurisdiction of the City of London Small Debts Court.

Lush now showed cause.—This application is founded on sect. 1 of The Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67). That section enacts that upon proceedings under the Act, unless defendant obtains leave to appear, and does appear, the plaintiff may sign final judgment for any sum not exceeding the sum endorsed, with interest, "and a sum for costs to be fixed by the Masters of the *Superior Courts or any three of them, subject to the approval [*947 of the Judges thereof or any eight of them (of whom the Lord Chief Justices and the Lord Chief Baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way." These words are, it will be said, express. But they must be taken in connection with other statutes respecting costs, and are to be understood as merely regulating the amount of costs to be allowed where costs are to be allowed at all: and this last question depends upon the Statute of Gloucester (6 Ed. 1), c. 1, s. 2, which gives the demandant generally the costs of his writ purchased, and The London (City) Small Debts Extension Act, 1852 (15 & 16 Vict. c. lxxvii.(a)), and stat. 19 & 20 Vict. c. 108. Stat. 15 & 16 Vict. c. lxxvii., by sects. 119, 120, expressly enacts that the plaintiff shall have no costs in such a case as this, where the City Court has jurisdiction and the sum recovered is less than 20*l.* This enactment is quite general, and is not repealed either expressly or impliedly by stat. 18 & 19 Vict. c. 67, which nowhere expressly gives costs to the plaintiff. Again, the County Courts Acts Amendment Act, 19 & 20 Vict. c. 108, by sect. 4, enacts that the provisions of that Act, and the other county court Acts recited, "which apply to any debt not exceeding 20*l.* shall apply to such debt or any part thereof, although the same shall be secured by or claimed upon bill of exchange or promissory note, and notwithstanding the statute" (18 & 19 Vict. c. 67). It is *cer- tainly not said that the provisions of stat. 15 & 16 Vict. c. lxxvii. [*948 shall so apply: but that statute is left untouched, and repeals to a limited extent the Statute of Gloucester. It is true that an argument may be raised from stat. 19 & 20 Vict. c. 108, s. 4, in favour of plaintiff; for it may be urged that the enactment would have been unnecessary unless stat. 18 & 19 Vict. c. 67 repealed the clauses as to costs in the County Court Acts; and therefore that the clauses in stat. 15 & 16 Vict. c. lxxvii. are similarly repealed, but are not revived by the later Act. Such an inference, however, scarcely warrants the supposition that the Statute of Gloucester, so far as repealed by stat. 15 & 16 Vict. c. lxxvii., is re-enacted by stat. 18 & 19 Vict. c. 67.

(a) Local and personal, public: "For the more easy recovery of small debts and demands within the City of London and the liberties thereof." Printed at length in the Statutes at Large.

Quain was not called on to support his rule.

Per CURIAM, (a)

Rule absolute.

(a) Lord Campbell, C. J., Coleridge, Wightman, and Erle, Js.

*949] *REGULA GENERALIS. Jan. 30.

The following Rule was this day read in Court.

Hilary Term, 1858.

Whereas by the Rule of Michaelmas Term, 1855, (a) with respect to *950] endorsements on writs issued under the *Bills of Exchange Act, 1855, it was, amongst other things, ordered "that no other claim than a claim on a bill of exchange or promissory note should be included in writs under The Summary Procedure on Bills of Exchange Act, 1855."

And whereas it is expedient that the said Rule should be explained and amended:

It is hereby ordered that, where a defendant obtains leave to appear according to the said Act, and enters appearance to any such writ according to the said Rule of Michaelmas Term, 1855, the plaintiff

(a) The following appears to be the Rule referred to. The Reporters cannot learn that it has been read in Court.

MICHAELMAS TERM, 1855.

THE SUMMARY PROCEDURE ON BILLS OF EXCHANGE ACT, 1855.

The endorsements on writs under this Act may be in the following form:—

This writ was issued by E. F., of, &c., attorney for the plaintiff.
Or by A. B., who resides at [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence.]

The plaintiff claims pounds principal and interest, [or pounds balance of principal and interest] due to him as the payee [or endorsee] of a bill of exchange [or promissory note] of which the following is a copy:—

[Here copy bill of exchange or promissory note, and all endorsements upon it.]

And also shillings for noting [if noting has been paid] and £ for costs. And if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed.

NOTICE.

Take notice, that if the defendant do not obtain leave from one of the Judges of the Courts within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do not within such time cause an appearance to be entered for him in the Court out of which this writ issues, the plaintiff will be at liberty at any time after the expiration of such twelve days to sign final judgment for any sum not exceeding the sum above claimed, and the sum of £ for costs, and issue execution for the same.

Leave to appear may be obtained on an application at the Judges' Chambers, Serjeants' Inn, London, supported by affidavit showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.

Endorsement to be made on the writ after service thereof:—

This writ was served by X. Y. on L. M. [the defendant], on Monday, the day of 1855 by X. Y. BY THE JUDGES.
November 26th, 1855.

N. B.—No other claim than a claim on a bill of exchange or promissory note is to be included in writs issued under the Summary Procedure on Bills of Exchange Act, 1855.

may include in his declaration, together with a count on the bill of exchange or promissory note (as the case may be), a count upon the consideration, if any, between the *plaintiff and defendant for [*951 the bill of exchange or promissory note, and deliver a particular of demand accordingly.

(Signed)

CAMPBELL.

A. E. COCKBURN.

FRED. POLLOCK.

J. T. COLERIDGE.

WM. WIGHTMAN.

W. ERLE.

E. V. WILLIAMS.

SAMUEL MARTIN.

R. B. CROWDER.

J. WILLES.

G. BRAMWELL.

W. H. WATSON.

W. F. CHANNELL.

J. BARNARD BYLES.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN

Wiliary Vacation,

XXI. VICTORIA. (a) 1858.

The Judges of the Court of Queen's Bench who generally sat in Banc in this Vacation were:

COLERIDGE, J.
WIGHTMAN, J.

ERLE, J.
CROMPTON, J.

The LANCASTER and CARLISLE Railway Company v. HEATON and Another. Feb. 11.

By a private Act, 5 G. 4, c. 28, no person appointed to act as tithe valuer shall be capable of acting, &c., until he shall have taken and subscribed an oath in the words following: I, A. B., do swear that I will faithfully, &c., execute, &c. "So help me God." The oath had been subscribed with the omission of the words "So help me God." Held: that the oath had nevertheless been properly administered according to the statute; for the words omitted were no part of the oath, but only an indication of the manner of administering it.

By the same statute, certain tithes and dues were commuted for a specific corn-rent, to be raised by assessment upon the landowners; and by sect. 30, the Court of Quarter Sessions, once in every ten years, upon application to be made to them by certain landowners to appoint a person to make a new valuation, &c., of all the lands, &c., within the township, &c., and again to apportion, &c., the respective annual sums which each and every of the owner or owners, &c., shall or ought to be charged with, &c., was required, by order of the said Court, to nominate and appoint one or more fit and proper person or persons, not interested in the said tithes or dues, and not being the steward or agent of any person so interested, to make a new valuation and assessment, &c. In an action of replevin, upon a distress for a sum for which the plaintiffs had been assessed in pursuance of such a valuation, it was contended that the land was not liable, because the appointed tithe valuer, who was a shareholder in a railway passing through the township, was interested in the tithes and dues; that the Sessions had consequently no jurisdiction to appoint him; and that therefore his acts were null and void.

Held, assuming him to be interested within the meaning of the section, and that the order appointing him might have been brought up by certiorari and quashed, that as the Sessions had jurisdiction to inquire and determine whether he was interested and the appointment had not been set aside, he was de facto in the office of tithe valuer; and that consequently his acts done whilst so in office were not null and void, and could not be challenged in the action of replevin.

Seem that, upon a true construction of the section, he was not a person interested in the tithes and dues so as to make his appointment in any way objectionable, an earlier section of the Act distinguishing between persons interested in the lands and persons interested in the tithes.

(a) The Court of Queen's Bench sat in Banc on February 2d, 3d, 9th, 10th, 11th, and 12th, and, for the delivery of judgments only, on 23d.

REPLEVIN for seizing goods of the plaintiffs on certain lands of the plaintiffs, called The Lancaster *and Carlisle Railway, situated [*953 in the township of Skerton, in the parish of Lancaster. Avowry by the defendants, as the tithe collectors for the said township of Skerton, under an Act, 5 G. 4, c. 28, private, "To commute, for a corn rent, certain tithes and dues payable to the vicar of the parish of Lancaster, in the county of Lancaster," to recover 23*l.* 3*s.* 2*d.*, one year's rent in arrear, to which the plaintiffs' said land was liable as and for a rent-charge thereon in lieu of tithes. Plea, traversing that the said land whereon, &c., was liable to pay the said yearly rent as alleged.

On the trial, before Channell, B., at the Summer Assizes for the Northern Division of Lancashire, it appeared that in 1824, by agreement between the vicar of the parish of Lancaster and his parishioners, stat. 5 G. 4, c. 28, was passed, in which it was recited, amongst other things, that there were within the parish of Lancaster fifteen several townships or divisions; and that the vicar claimed to be entitled to the great tithes arising or becoming due within some of the said townships or divisions, and to all small tithes and Easter offerings arising or becoming due within the whole of the said townships or divisions, except as thereafter mentioned; and that many disputes had arisen, between the vicar and certain of the proprietors and occupiers, *touching [*954 certain claims to moduses or compositions real; and that it would tend to prevent litigation and be a great benefit, &c., if the said tithes and dues were extinguished and an adequate compensation made for the same: and that it had been proposed, on behalf of the said proprietors and occupiers, that a clear annual rent of 1358*l.*, liable to be increased and varied, but not to be diminished below such sum, according to the price of wheat, as thereafter mentioned, should be raised by the said fifteen townships or divisions, and paid to the said vicar and his successors, by way of commutation, and in lieu and full compensation of and for all such tithes and dues as were or should be or become due or payable to the said vicar, or his successors, arising within and in respect of the same townships or divisions, except as in the Act is mentioned and excepted: and that the said annual sum of 1358*l.*, liable to be varied as aforesaid, should be raised and paid by the said proprietors and occupiers within the said fifteen several townships or divisions, in the shares and proportions thereafter mentioned; and that the vicar did approve of such proposal, and was desirous that such commutation might be established and confirmed. By sect. 17 the proportion of the said annual rent-charge to be paid by the township of Skerton was fixed at 100*l.* In 1855 certain landowners in the township of Skerton gave notice, under sect. 30, of their intention to apply to the Quarter Sessions to appoint a person to make a new valuation and assessment in Skerton for raising the said 100*l.*, the proportion of the aggregate corn rent payable by the township under the Act. Upon their application the Quarter Sessions appointed one Romney, who, under such appointment, did revalue the lands, &c., in Skerton, and did assess the plaintiffs, in respect of their *railway in Skerton, to pay the annual sum of 23*l.* 3*s.* 2*d.* In 1856, upon the first payment under this valuation and assessment falling due, the plaintiffs paid under protest the amount to the tithe collectors appointed under the Act. But in 1857 the plaintiffs declined to pay: and, after some negotiation between them

and the defendants, then the tithe collectors, the latter by arrangement put in a distress in order to raise the question in dispute between the parties. Romney, at the time of his appointment and when he made the valuation and assessment in dispute, was a shareholder in the Little North-Western Railway which passed through Skerton, so as to be liable to be assessed to the payment of the corn rent before mentioned. Before acting as valuer under his appointment, Romney, who was not a Quaker, was sworn upon the New Testament in the terms prescribed in sect. 1 of the Act (set out in p. 956, post), with the exception that the words "So help me God" were omitted in the oath. Upon this evidence it was objected at the trial, on behalf of the plaintiffs, that their land was not liable to the rent; for that the valuation and assessment made by Romney were void; first, because he was not properly sworn according to the Act; and secondly, because he was a person interested in the tithes and dues, and therefore the Quarter Sessions had no jurisdiction to appoint him. The learned Judge reserved leave to the plaintiffs to move to enter a verdict for them upon the above points, or either of them; and, subject to that, left the case to the jury, who found for the defendants.

*956] *Atherton*, in the ensuing Term, moved accordingly. (a)—*By sect. 1, no person to be appointed a commissioner or tithe valuer under this Act shall be capable of acting as such tithe valuer "until he or they shall have severally taken and subscribed an oath or affirmation, in the words following; (that is to say), 'I A. B. do swear, [*or being one of the people called Quakers*, do solemnly affirm], that I will faithfully, impartially, and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me as a commissioner [*or tithe valuer, as the case may be*] by virtue of an Act passed," &c., "'intituled,'" &c., "'without favour or affection, prejudice or malice. So help me God.'" [*If the person appointed commissioner or tithe valuer be a Quaker, then omit the words 'So help me God.'*] Which oath or affirmation any justice of the peace for the said county is hereby empowered to administer; and such oath or affirmation, when so taken and subscribed, shall be annexed," &c. Though Romney were otherwise entitled to make the valuation and assessment, yet they were void because he did not, before making them, take the prescribed oath. The words "So help me God," were omitted in the oath he took. [Lord CAMPBELL, C. J.—The words "So help me God" are no part of the oath; they only point out the mode of administering it. In *Salomons v. Miller*, 8 Exch. 778,†(b) that distinction was made between the words "on the true faith of a Christian," which in the statute there discussed were held to be a part of the oath, and the words "So help me God," which were treated throughout that case as words pointing out the manner in which the oath was to be administered. Here the right oath was taken, and in the right manner.]

*957] Romney was interested in *the matters on which he decided, and therefore his decision was void. It is void on general principles,

(a) November 5th, 1857. Before Lord Campbell, C. J., Coleridge and Wightman, J. J. E. J., had left the Court.

(b) In Exch. Ch., affirming the judgment of the Court of Exchequer in *Miller v. Salomons*, 7 Exch. 475.†

and within the very terms of sect. 30,(a) which give no other jurisdiction to the Quarter Sessions than to appoint one or more fit and proper person or persons not interested in the said tithes or dues.

Rule refused as to the first point. Rule Nisi as to the second.

Hugh Hill (with him *Thomas Jones* of the Northern Circuit) showed cause.—It is objected that Romney was a person interested in the matter on which he decided, and that therefore the valuation and assessment made by him were wholly null and void. But, first, Romney was not a person interested within the meaning of the section relied on; and, secondly, if he was, yet the validity of the valuation and assessment cannot now be disputed by the plaintiffs.

As to the first point. By sect. 30, "it shall and may be lawful to and for the said Court of Quarter Sessions, and the said Court is hereby required by order of the said Court, to nominate and appoint one or more fit and proper person or persons, not interested in the said tithes or dues, and not being the steward or agent of any person so interested, to make such new valuation and assessment as aforesaid." Romney was not a person interested in the said tithes or dues; for they were extinguished, and replaced by an aggregate corn rent before the railway existed in which he was a shareholder. The meaning of the words "person or persons not interested in the said tithes or dues," in sect. 30, must be the *same as that of the words "the person or persons interested in the said tithes and dues, or any of them," in sect. 12. By [*958 that section, "If any dispute shall arise between any of the said proprietors of or persons interested in or claiming to be interested in the said messuages, lands, and tenements, within the said several townships or divisions, or any of them, out of which the said tithes and dues are issuing and payable or claimed, and the person or persons interested in the said tithes and dues, or any of them, concerning the same tithes and dues, or the respective rights or interests which they or any of them may have or claim therein, or touching or concerning the extent and boundaries of such lands or hereditaments and premises, it shall be lawful for the said commissioner to hear and determine the same." In that section, therefore, the latter class are the vicar or other person or persons claiming to receive the tithes and dues, and the same class is intended by the same words in sect. 30. [CROMPTON, J.—In sect. 2 the words are: "In case the said commissioner, or any of his successors, shall die, or neglect or refuse to act," the Court of Quarter Sessions shall from time to time appoint some fit and proper person, "not interested in the matters in question," to be a commissioner in his room, &c. That is a phrase which seems to include both the classes of persons which are distinguished and contrasted by the phrases used in sect. 12. It seems to strengthen your view that the phrase in sect. 30 is confined to one class only.]

As to the second point. By sect. 30: "Whereas changes may happen to take place in the comparative value of the messuages, lands, and tenements within the said several townships or divisions, and it may be *expedient from time to time to make such new valuations and [*959 assessments as hereinafter mentioned; be it further enacted, that within one calendar month next after the feast of St. Thomas in the year

(a) The language of the sections of the private Act, so far as material to the decision, will be found in the arguments of the counsel.

1834, and so from time to time, within one calendar month next after the expiration of every or any further term of ten years respectively, but at no other intermediate time or times, it shall and may be lawful to and for any one or more person or persons who shall alone or collectively be the owner or owners of messuages, lands, and tenements charged with the payment of the said corn rent, within any of the said townships or divisions, of the yearly value of 100*l.* or upwards, to give notice in writing by advertisement," &c., "of his or their intention to apply to the justices of the peace," &c., "at the Court of Quarter Sessions to be holden at," &c., "next after the expiration of every such notice, to appoint one or more person or persons to make a new valuation, according to the best of his or their judgment, of all the messuages, lands, and tenements within such of the said townships or divisions respectively for which such new valuation shall be so required, and again to apportion, ascertain, and assess the respective annual sum or sums which each and every of the owners and occupiers of messuages, lands, and tenements within such township or division, for which such new valuation and assessment shall be so required, shall or ought upon such new valuation to be charged and chargeable with respectively, for and towards the raising and payment of the proportion of such township or division of the said aggregate corn rent, to be from time to time paid or payable to the said vicar; and upon every such application so to be made as aforesaid, it *960] shall and may be lawful to and for the said Court of Quarter Sessions, and the said Court is hereby required, by order of the said Court, to nominate and appoint one or more fit and proper person or persons, not interested in the said tithes or dues, and not being the steward or agent of any person so interested, to make such new valuation and assessment as aforesaid; and that such person or persons so to be nominated and appointed shall, with all convenient speed next after such his or their nomination and appointment, proceed to make such new valuation," &c., "and also to apportion, ascertain, and assess the respective annual sum or sums which each and every the owners and occupiers," &c., "shall or ought upon such new valuation to be charged and chargeable with respectively," &c.; "and from and after every such new valuation and assessment shall have been so made, and copies thereof shall have been so deposited and delivered as aforesaid, the same shall be substituted and shall thereafter be acted upon in the place and stead of any former valuation and assessment which may have been made for the purpose and under the authority of this Act, within such township," &c. By that section, the Court of Quarter Sessions has jurisdiction to inquire and determine, not only whether the person proposed to be tithe valuer is otherwise fit and proper, but also whether he is or is not interested in the tithes and dues: and when they have inquired and determined, and have appointed any person, such their appointment cannot afterwards be called in question. Where the Quarter Sessions have jurisdiction to inquire and determine, this Court will not review their decision: *Regina v. Bolton*, 1 Q. B. 66 (E. C. L. R. vol. 41). If the objection now taken can be maintained, such an objection might be taken ten *961] years after the appointment, so as to invalidate every payment which might have been made under the valuation and assessment during the ten years. The inconvenience is so great that it becomes a strong argument against a construction of the statute which would

authorize it. The act of the Sessions which is challenged is not a merely ministerial act to be done behind the backs of parties whom it may affect; but it is a discretionary and judicial decision to be made after a notice which it is presumed will reach all the parties interested. [CROMPTON, J.—Still, if the Quarter Sessions had no jurisdiction, may not the appointment be now challenged as invalid?] If the decision could at any time be questioned, it should have been by way of appeal under sect. 39. By sect. 39 any person, aggrieved by anything done under this Act, may appeal to the Quarter Sessions which shall be held next after the expiration of two calendar months next after the cause of complaint shall have arisen, who shall hear and determine the matter of every such appeal; “and every order and determination of the said justices upon every such appeal shall be final and conclusive to all parties concerned, and shall not be removed or removable by certiorari, or any other writ or process whatsoever,” &c. [COLERIDGE, J.—That section is not applicable to the act of appointing a tithe valuer. The appeal would be to the Quarter Sessions against an act done by the Quarter Sessions, which cannot be. That applies to appeals against any wrong decision of the tithe valuer acting in his office.] In *Churchwardens of Birmingham v. Shaw*, 10 Q. B. 868 (E. C. L. R. vol. 59), it was held that a person alleging himself to be improperly assessed to the poor-rate must contest the liability by appeal, and cannot *main- [*962
tain an action for a levy made to enforce such rate not appealed
against. In *Metropolitan Board of Works v. Vauxhall Bridge Com-
pany*, 7 E. & B. 964 (E. C. L. R. vol. 90), it was held that a sewers-
rate, laid under stat. 11 & 12 Vict. c. 112, could be impeached only by
appeal to the commissioners, and therefore that it was not competent to
a party, sued in an action under stat. 18 & 19 Vict. c. 120, s. 147, for
recovery of the rate, to object that the property in respect of which
he was rated derived no benefit from the sewers. The decision of an
interested judge is not void, but only voidable, on that ground: *Dimes
v. Proprietors of the Grand Junction Canal*, 3 H. L. C. 759. It may
be, therefore, that this appointment might have been brought up to this
Court by certiorari, and an application made to quash it. But, if so,
first, that should have been done within a reasonable time; and, secondly,
as it was not done at all, the appointment stands good, and cannot be
questioned in the present action. The case comes within the principle
that acts done by a person in office, which are so done that they could
not have been impeached if so done by a person proper to be appointed
to the office, cannot be impeached on the ground that he who did them
was one who ought not to have been appointed to such office. In *Scad-
ding v. Lorant*, 3 H. L. C. 418, (a) it was objected, in an action of replevin
brought upon a distress to enforce a rate, that the rate was invalid, on
the ground that certain vestrymen who signed it, though acting as
vestrymen de facto, were not vestrymen de jure. The objection was
overruled. The Lord Chancellor (b) as to this point said: “With regard
to the *competency of the vestrymen, who were vestrymen de [*963
facto, but not vestrymen de jure, to make the rate, your Lord-
ships will see at once the importance of that objection, when you consi-

(a) In *Dom. Proc.*, affirming the judgment of Exch. Ch. in *Lorant v. Scadding*, 13 Q. B. 706 (E. C. L. R. vol. 66), which reversed the judgment of Q. B. in *Scadding v. Lorant*, 13 Q. B. 657

(b) 1 H. L. C. 447.

der how many public officers and persons there are who are charged with very important duties, and whose title to the office on the part of the public cannot be ascertained at the time. You will at once see to what it would lead if the validity of their acts, when in such office, depended upon the propriety of their election. It might tend, if doubts were cast upon them, to consequences of the most destructive kind. It would create uncertainty with respect to the obedience to public officers, and it might also lead to persons, instead of resorting to the ordinary legal remedies to set right anything done by the officers, taking the law into their own hands."

Atherton and C. Milward, contra.—The question is, whether the land on which the distress was levied was liable to pay a proportion of the corn rent. The defendants were bound to show that it was, and could do so only by showing that the plaintiffs were duly assessed in respect of it by a tithe valuer, against whose title the plaintiffs could not maintain a valid objection. But, first, Romney was interested within the meaning of sect. 30. By sect. 22, "the said annual sum or corn rent, to be apportioned and paid as hereinbefore mentioned, shall be and the same is hereby declared to be in full bar, satisfaction, discharge, and extinguishment of and for all tithes, oblations, obventions, Easter dues, and all other dues and payments of every denomination whatsoever, payable to the said vicar and his successors," &c. The words "not *964] interested in the said tithes or *dues," found in sect. 30, cannot therefore be construed strictly, because the tithes and dues treated of in the Act are extinguished by sect. 22, so that no one can be interested in them at the time of the appointment of a tithe valuer under sect. 30. By sect. 33: "for the due collection of the said corn rent from the several persons liable to pay the same, be it enacted, That four, three, or two substantial householders," &c., "in each of the said townships," &c., "to be nominated yearly by the inhabitants thereof," &c., "shall be and be called tithe collectors," &c., "which persons may and shall," &c., "levy and raise the several sums," &c.; "and that out of such money," &c., "the several sums of money to become due to the vicar," &c., "under or by virtue of this Act, shall be paid by the said tithe collector or collectors respectively, to the vicar," &c. The vicar therefore is a person who cannot by possibility be interested in the assessment. To him is to be paid an ascertained sum. It must be indifferent to him how that sum is divided by assessment upon the different proprietors. But each proprietor is interested in the assessment to be made on him and on each of his neighbours. If any one proprietor liable to be assessed were appointed to be valuer, his proportion would be less if the assessments made by him on his neighbours were increased. The mischief aimed at by the words in sect. 30 is the appointment of a tithe valuer of that class. And Romney was a person precisely of that class. He was therefore a person interested within the meaning of the words used. He being interested, the plaintiffs can take advantage of the objection in the present action. The argument of inconvenience cannot be relied on. It would be unjust to allow an assessment to pre-
*965]vail made by an interested valuer. [*COLERIDGE, J.—If the assessment were unjust there would be an appeal under sect. 39.] No appeal lies, under sect. 39, to the sessions against the appointment. [COLERIDGE, J.—You need not labour that point: we are all of opinion

that no such appeal could be maintained.] The Sessions had no jurisdiction to appoint Romney; and therefore the objection can be taken now that his valuation and assessment were wholly void. The class of persons from whom the sessions had authority to appoint a tithe valuer was a limited class; and from it Romney was excluded. The effect of the section is the same as if it had enacted in terms that the Sessions should not appoint Romney. To say that he was tithe valuer *de facto* assumes that he was appointed tithe valuer; but, as the Sessions had no jurisdiction to appoint him, their alleged appointment was wholly null and void. He never was appointed, and had no colour of authority to act. This distinguishes the case from *Dimes v. Proprietors of the Grand Junction Canal*, 3 H. L. C. 759, because there the Lord Chancellor had a general jurisdiction to decide such matters. [ERLE, J.—You say that the Sessions had no jurisdiction to appoint an interested person. But had they not jurisdiction to determine whether the proposed person was interested or not? Must they not determine whether he was fit and proper? Could you raise the question now whether he was fit or proper? And, if not, how can you now challenge him on the ground of interest? Would not your argument, if maintainable, permit you equally to object now that the persons who set the Sessions in motion, under sect. 30, were not owners of lands of the yearly value of 100*l.*, *or that they did not give the proper notices by advertisement?] [*966 But the power of appointment is limited to a particular class. If unauthorized persons, acting as overseers, make a poor-rate, the rate is bad. “The 43 Eliz. c. 2, s. 1, directs that the rate shall be made by the churchwardens and overseers of the poor of the parish, or the greater part of them, and therefore, if other persons exercise this power, the rate is bad:” *Steer’s Parish Law*, by Hodgson, 3d ed., p. 494. [COLERIDGE, J.—That is said with reference to its being bad on appeal.] In *Governors of the Bristol Poor v. Waite*, 1 A. & E. 264, 280, 281 (E. C. L. R. vol. 28), in an action of replevin, it seems to have been assumed that any objection may be taken, in such an action, which shows that the rate relied on in the avowry, though actually imposed at Sessions, was legally void. [*Hugh Hill* referred to *Penney v. Slade*, 5 Bing. N. C. 319 (E. C. L. R. vol. 35).]

COLERIDGE, J.—I am of opinion that this rule must be discharged. Two points have been relied on in argument in support of it: first, it was said that Romney was an interested person within the meaning of sect. 30; and, secondly, if so, that the objection might be made available now. The first point depends upon what is the true construction of the section. It is so loosely worded that much might be said against the view of his being interested: but I will assume that he was interested, and so that, upon objection taken on that ground at the Sessions, the appointment ought not to have been made. But then arises the second point, which is, whether, assuming Romney to have been interested, inasmuch as he was *de facto* appointed by the Sessions and acted under such *appointment, the acts done by him in pursuance of it can now be said to be wholly void. If the Court of Quarter Sessions [*967 had jurisdiction to inquire and determine whether he was or was not interested, I am of opinion that his acts cannot now be challenged. And I am of opinion that the Court of Quarter Sessions had such jurisdiction.

The observations of my brother Erle during the argument seem to me to have great weight. Suppose that the persons applying for a new valuation should turn out not to have been properly qualified. Could the whole assessment be set aside on that ground? Upon the application of certain occupiers the Sessions are bound to act; they are required to nominate and appoint a valuer. Suppose they should consider the person nominated by the applicants to be fit and proper, and no objection should be taken that he was interested, would they not be justified in appointing him? And, if he were then to act, can it be tolerated that, upon proof given afterwards that he was in fact interested, all his acts should be held to be void? Or, suppose the objection were made at the Sessions that he was interested, would not the Sessions be bound to inquire into and determine that complaint as much as a complaint that he was not fit or proper? And if they decided that he was not, and he was appointed and acted, and everybody acquiesced, can it be that, at the end of ten years, all the payments made in the township should be invalid, and all the proprietors liable to distress for non-payment of ten years of arrears? Is not this a case in which the interpretation in one sense is so inconvenient that the Court is bound to give the other of which the words of the enactment are capable? I am of opinion that, *968] assuming there was an objection to *this appointment, such that if it had been properly brought before the Court the appointment would have been set aside, yet, as that course was not taken, as the tithe valuer was de facto appointed, and acted under his appointment, and such appointment has not been set aside, his acts, done in pursuance of such appointment, are not to be now considered as null and void.

WIGHTMAN, J.—I am of the same opinion. On the first point, the inclination of my opinion is that Romney was not interested within the meaning of sect. 30, and that the interest therein referred to is that of the owner, or the agent of the owner, of the tithes. In sect. 12, the distinction taken between the two classes of persons is described to be as between the proprietors of or persons interested in the messuages, lands, and tenements within the township, and the person or persons interested in the tithes and dues. There the class described by the terms “interested in the said tithes and dues” is obviously that of the owner of the tithes; and it may be therefore that the same class is meant when the same terms are used in sect. 30. When both classes are to be described, as in sect. 2, the term used is different, namely, “not interested in the matters in question.” But, whatever may be the proper decision as to the first point, I am clearly of opinion that, assuming Romney to have been interested, yet, as he was in fact appointed by the Sessions, who had jurisdiction to appoint a person who in their judgment was fit and proper and not interested, his office was not empty, nor was his appointment void, nor can his acts be now treated as if they were so. It cannot be denied that the Sessions had jurisdiction to appoint a fit *969] and proper person not interested: it seems *to me to follow as an incident that they had jurisdiction to inquire and determine whether a person proposed to them was fit, proper, and uninterested. It may be that the Sessions were mistaken or misled in their decision; and, as I am clearly of opinion that the appointment could not have been questioned by appeal at the Sessions, it may be that, if the appointment had been properly brought before this Court, it might have been set

aside. But, as it was in fact made and has not been set aside, I am of opinion that no objection to the validity of the acts done under it can be sustained in this action of replevin.

ERLE, J.—If the determination of this case had depended upon the first point, I should have been inclined to say that Romney was not proved to have been interested within the meaning of sect. 30. The inconvenience of setting aside such an appointment at such a stage would be so great that I could not agree to do it unless I felt myself clearly obliged. I incline to think that he was of the class interested in the lands, and not of the class interested in the tithes. But it is unnecessary to determine that point, because I agree that, even if he was interested, his appointment cannot be treated as a nullity. The objection is taken in an action of wrong; and it is contended to be fatal on the ground only that the appointment was a nullity. But, if the Sessions had jurisdiction to make the appointment, though they made it erroneously, it cannot be treated as a nullity. I am clearly of opinion that they had jurisdiction to make the appointment. By the section, the Sessions are, as it seems to me, to determine every step preliminary to the appointment. They are to determine whether the *person proposed is fit, and whether he is proper. That is hardly denied. It seems [*970 to me they are clearly authorized and required to determine whether he is interested. If a party alleged at the sessions that the proposed valuer was interested, it seems clear to me that the Sessions must hear and determine whether he was or not. That is a test to show whether they had jurisdiction. I think they had. The end of sect. 30 assists this view, because it seems to determine that the valuation *de facto* made by the tithe valuer *de facto* appointed shall from the time of its being made supersede and be substituted for the old valuation.

CROMPTON, J.—I am of the same opinion on both points. The words which are used in sect. 30, and are under discussion, are used in sect. 12 in contradistinction to “persons interested in the said messuages, lands, and tenements,” “out of which the said tithes and dues are issuing.” They therefore, in that section, clearly mean the class of persons interested in the tithes as owners. In sect. 2, where it is intended to describe both classes, the form is changed into “not interested in the matters in question.” The inconvenience which would follow from the contrary construction leads me to determine that in sect. 30 they have the same meaning as in sect. 12. The words are clearly capable of that construction. It may be that the Legislature considered that a much greater mischief would arise if a person of extensive influence as a tithe-owner were appointed, than if a person were appointed who had a minute interest as a landowner. I am of opinion that neither within the words or intention of the section was Romney a person interested. We should be obliged to strain the language *to say that he was. As to the [*971 other point, I agree also with the rest of the Court. The general principle is that acts done by a person *de facto* in such an office as this are valid. It would be monstrous if it were otherwise. I am clearly of opinion that the Court of Quarter Sessions had jurisdiction to appoint Romney, and that all acts done by him whilst in the office *de facto*, until the order to appoint him should be brought up by certiorari and quashed, being acts done by a person under a personal disability to hold the office but holding it *de facto*, would be valid. Such acts cannot be invalidated,

under such circumstances, in an action such as this. By sect. 33, the inhabitants of each township are yearly to appoint two substantial house-keepers, not being Quakers, to be tithe collectors for the year. Suppose a person not known to be a Quaker to be so appointed and to act, is it reasonable to say that his acts, acquiesced in for years, could be set aside as nullities upon an inquiry into his religious persuasion in an action at Nisi Prius in such a suit as this? Rule discharged.(a)

(a) Reported by W. B. Brett, Esq.

*972] *ELIZA TOPHAM v. MORECRAFT. Feb. 11.

T., by her will, desired that a sum of 500*l.*, lent by her to the defendant, should be allowed to remain in his hands during the life of her sister, he paying the interest to her sister, but that on her sister's death T.'s executors should collect the 500*l.* and divide it between her two nieces, one of whom was the plaintiff, and the other the defendant's wife, the same to be for their sole and separate use respectively, free from the control and debts of any husband, with benefit of survivorship, &c. During the lifetime of the tenant for life, the plaintiff's husband took from the defendant his acceptance for 242*l.*, payable in twelve months, as and for the share of the plaintiff's wife in the legacy. The plaintiff and her husband, and the defendant and his wife, signed a receipt to the executor of T.'s will as and for a receipt of the legacy of 500*l.* But no money ever in fact passed; the 500*l.* was never collected from the defendant; the acceptance was never negotiated; and, on the death of the plaintiff's husband, the defendant procured a return of it to him. Again, the plaintiff's father by his will bequeathed to her the proceeds of a life policy, and made the defendant his executor, who, acting in that capacity, received 200*l.* upon the policy. Afterwards, and after the death of the plaintiff's husband and the defendant's wife, the plaintiff claimed from the defendant payment of the two sums of 242*l.* and 200*l.*, and a further sum for money lent by her to him. At an interview between them, in the presence of the plaintiff's attorney, the defendant dictated, and the attorney wrote out, a memorandum, by which the defendant charged himself with the two sums of 242*l.* and 200*l.*, and the item for money lent, and with interest from the date of the death of the plaintiff's husband. At the same interview he mentioned certain claims of his against the plaintiff's husband, and asked whether he could set them off, but did not enter them in the memorandum. He also afterwards, at the same interview, signed on the back of the memorandum an authority to his attorney to pay the plaintiff the amount due to her out of any moneys that might be received on his account, referring verbally to an intended sale of some property on his behalf. At the trial no evidence was given of any set-off.

In an action on the common counts, it was objected that the 242*l.* had been reduced into possession by the plaintiff's husband, and therefore she had no right of action at law in her personal capacity, and that the 200*l.* was held by the defendant as executor, and therefore he could not properly be sued in his personal capacity, and that the memorandum and authority taken together were not, under the circumstances, a statement of an account *as dec in præsentia*. Held, that the jury were justified in finding that the memorandum was a statement of account, sufficient to entitle the plaintiff to maintain her suit in respect of both the sums.

DECLARATION for money had and received; money lent; interest; and on accounts stated. Pleas: Never indebted; Payment; As to 110*l.*, Set-off. Issues thereon.

At the trial, before Erle, J., at the London Sittings in Michaelmas Term last, it appeared that the action was brought to recover the sum *973] of 512*l.* 2*s.* 10*d.*, consisting *of the following items: namely, 242*l.*, the amount of a legacy left to the plaintiff under the will of her aunt, Isabella Turner; 200*l.*, the amount of a legacy left to her under the will of her father, Joseph Hamston; 30*l.* 15*s.* 4*d.*, money lent by the plaintiff to the defendant at different times; and 39*l.* 7*s.* 6*d.*,

interest from the death of the plaintiff's husband up to March, 1857. The plaintiff and the defendant's wife were sisters, daughters of Joseph Hamston, nieces of Isabella Turner. The husband of the plaintiff and the defendant's wife were dead. Isabella Turner died in 1847: and by her will, dated the 31st of March, 1840, after reciting that she had advanced the sum of 700*l.* by way of loan to the defendant to assist him in his business, and for which he paid her interest at 5*l.* per centum per annum, and that it was her wish that during the respective lives of her two sisters, and as long as the defendant's business should continue to prosper, her executors should allow the said sum to remain in his hands, he paying the interest, bequeathed the said sum of 700*l.* upon trust, as to five-sevenths thereof, to pay the interest thereof unto her sister Mary (the mother of her said nieces) for life; and, after her decease, her executors to collect in or convert into money the said five-sevenths of the said sum, and divide and pay the same unto and between her nieces, Mary Ann (the wife of the defendant) and Eliza (the plaintiff) equally, to and for their own absolute use and disposal, and for their sole and separate use respectively, free from the control and not subject to the debts or engagements of any husband, &c., with benefit of survivorship between her said nieces, in case either of them should die in her lifetime, or in the *lifetime of her sister Mary (their mother), &c. On [974 the 2d of March, 1850, after the death of Mrs. Turner and before the death of Mrs. Turner's sister Mary (Mrs. Hamston), the defendant, who still held the 700*l.*, entered into an arrangement with the plaintiff's husband as to the plaintiff's share of the 700*l.* coming to her under her aunt's will: that it should be left in his hands for twelve months, at all events, upon his giving his acceptance for it payable in twelve months: and he accordingly then gave to the plaintiff's husband his acceptance for 242*l.* 10*s.*, payable twelve months after date. Mrs. Hamston died on the 13th of March, 1850. Upon her death the 700*l.* was not in fact collected by Mrs. Turner's executor; it was left with the defendant: but, on the 21st of May of that year, the plaintiff and her husband, and the defendant and his wife, signed and delivered to the executor the following receipt: "Received 21st May, 1850, of Mr. G. H. Matyear, executor of the late Mrs. Isabella Turner, 485*l.* in full of all demands due to us from the will of the said Isabella Turner." Afterwards the plaintiff's husband died: and after his decease the defendant, without the knowledge or consent of the plaintiff, obtained from a clerk in her husband's employ, and kept possession of, the bill for 242*l.*, which had never been negotiated. By the will, dated the 7th of June, 1837, of Joseph Hamston, who died in March, 1845, he bequeathed all his property, and, amongst other things, his policy on his life insured in The Amicable Insurance Office, unto his wife Mary Hamston for life; and, after her decease, to be equally divided between his two daughters, Eliza the plaintiff, and Mary Ann the defendant's wife; and he *appointed the defendant and another, who afterwards died, his [975 executors, who duly proved the will. The defendant received and retained the amount of the policy and other sums under that will, allowing to the testator's widow during her life 5*l.* per centum per annum for the use of it. In 1857 the plaintiff's husband and the defendant's wife being dead, the defendant wrote to the plaintiff expressing an intention of leaving England, stating at the same time, "your claim upon

me, as well as all others, will be referred to Mr. Clemmans for settlement:" and thereupon the plaintiff consulted her attorney, who pressed the defendant for an immediate settlement of the plaintiff's claims. On the 3d of April, 1857, the plaintiff and her attorney met the defendant by appointment at his house in Gloucester. During the discussion which then took place, in answer to a question by the defendant as to what would have been done if he had not come to Gloucester, he was told that, upon production before a Judge of his letter expressing an intention to leave England, he might have been arrested, and that such course would have been taken: and during the same discussion the defendant alleged that the plaintiff's husband had, during his lifetime, wrongfully withheld some money from him, and asked whether he could stop the amount from the plaintiff's claim. The defendant, upon being pressed as to the plaintiff's claims under the two wills and otherwise, said that, instead of going to London, which he had arranged to do, he could give the exact account down there; and, taking a pocket-book from his pocket, he dictated to the plaintiff's attorney, who then wrote down, the following memorandum:

*976] "Mr. Morecraft

"To Mrs. Topham.

"Cash due to Mrs. Turner's estate, and to which Mrs.

Topham is entitled to half, 500*l*. £250 0 0

"Less legacy duty 8 0 0

242 0 0

"Received the sum of insurance Company

on account of Mrs. Topham's father,

Joseph Hamston, to which Mrs. Top-

ham is entitled to half £465 16 0

"Cash 50 0 0

515 16 0

"Paid funeral and other expenses 115 16 0

400 0 0 200 0 0

"Cash lent you 30 15 4

"Interest due up to March, 1857 39 7 6

£512 2 10"

At the same interview, after the said memorandum was made, the defendant, who had lately married a second time, said that he was going to receive money from an intended sale of some property of his wife, and offered to give, and did give and sign, the following order to his solicitor, drawn out by the plaintiff's solicitor, and endorsed upon the back of the above memorandum:

"Gloucester, April 3d, 1857.

*977] "I hereby authorize and empower you to pay Mrs. *Topham the amount due to her out of any moneys that you may receive on my account, or on the account of Mrs. Morecraft, the particulars of

which account are endorsed hereon, subject to any legal claim I may have against her."

Upon this evidence, it was objected, on behalf of the defendant, that neither of the two sums of 242*l.* or 200*l.*, nor the sum claimed for interest, could be recovered; for the 242*l.* had been reduced into possession by the plaintiff's husband during his lifetime, and the plaintiff had therefore no right of action to recover it in her own name; and the defendant held the 200*l.* as executor, and therefore even an express promise to pay it to the plaintiff on request would not have supported the action in its present form: but, further, that there was no evidence of any express promise, or, if there was evidence of a promise, it was not of a promise to pay on request. The learned Judge overruled the objections: and the jury found a verdict for the plaintiff for 512*l.* 2*s.* 10*d.*; leave being reserved to the defendant to move to reduce the amount to any sum not less than 30*l.* 15*s.* 4*d.*, the amount of the item for money lent, as to which it was admitted that the defendant had no defence.

In the same Term, *Montague Smith* obtained a rule Nisi accordingly.

Pigott, Serjt., and *J. J. Powell*, showed cause.—The plaintiff's legacy of 242*l.* was not reduced into possession by her husband in his lifetime. The fact relied on, to show that it was, is that the husband took the defendant's acceptance for it. But, first, that transaction took place before the money left to her by her aunt's will belonged *to his [*978 wife: it took place during the lifetime of Mrs. Hamston, who stood in the position with regard to it of tenant for life; and therefore the wife's interest was not affected, being at that time a contingent interest only, which did not vest until Mrs. Hamston's death. A conveyance made by a husband of his wife's interest in remainder in personalty during the life of the tenant for life does not pass the wife's interest: *Purdew v. Jackson*, 1 Russ. 1. And, secondly, if the taking of the acceptance had any effect upon the wife's interest in the legacy, the transaction amounted to a contract for a new loan from the time of Mrs. Hamston's death, whenever that might be, to the defendant on behalf of the husband and wife, so that, on the husband's death, the cause of action in respect of it survived to the plaintiff, who is entitled to recover on the count for money lent. [CROMPTON, J.—Would not such a contract be at law the contract of the husband alone, on which he alone would be entitled to sue during his lifetime, and his administrator on his death?] The proper party, whoever that might be, to sue the defendant at law before the statement of account would in equity have held the proceeds of the suit as trustee for the plaintiff; for she was entitled in equity to the legacy left to her for her sole benefit. By the statement of account, therefore, at Gloucester, to support which the equity of the plaintiff was a sufficient consideration, the defendant became debtor to the plaintiff, and liable to this suit. Or, if, in strictness, the plaintiff ought to have sued as administratrix, the defendant, by stating the account with her *in her own personal capacity, [*979 led her to sue in her own right, and therefore cannot afterwards insist that she ought to have sued in a representative capacity. As to the 200*l.*, to which the plaintiff was entitled under her father's will, it is true that the defendant received it and for a time held it as executor; but, when at Gloucester he stated an account with respect to it, he from

thenceforward held it as a debtor to the plaintiff: *Roper v. Holland*, 3 A. & E. 99 (E. C. L. R. vol. 30); *Wasney v. Earnshaw*, 4 Tyr. 806. The principle is recognised and adopted in subsequent cases, though the facts in them were held not to be within it. Thus in *Bartlett v. Dimond*, 14 M. & W. 49, 56,† *Pollock, C. B.*, says: "We think that the moneys received were originally received in trust; and that the trust had not determined at the testator's death. If that trust was ended, and the testator had stated an account, or, in other words, had admitted himself to the plaintiff that he held any sum of money in his hands payable to him absolutely, he would, with respect to that sum, be a debtor, not properly a trustee, and then an action would have been maintainable against him." So in *Pardoe v. Price*, 16 M. & W. 451, 458,† *Rolfe, B.*, in giving the judgment of the Court, says: "When, indeed, there is no trust to execute, except that of paying over money to the cestui que trust, the trustee, by his conduct, as for instance, by admission that he has money to be paid over, or by settling accounts on that footing, may, and often does, make himself liable to an action at law at the suit of the cestui que trust, for money had and received, or for money due on *980] account stated." So per Lord Campbell, *C. J., in *Edwards v. Lowndes*, 1 E. & B. 81, 89 (E. C. L. R. vol. 72): "If, indeed, the trustee, by appropriating a sum as payable to the cestui que trust, or otherwise, admits that he holds it to be paid to the cestui que trust, and for his use, the character of the relation between the parties is changed; and the trustee does not hold it as a trustee properly so called, but as a receiver for the plaintiff's use, who may maintain an action at law for money had and received, founded upon the appropriation to his use and the liability thence arising." In the present case the allowance of interest by the defendant, in the account dictated by him, shows more strongly the sense in which the admission was given. It is no disparagement to the admission that the defendant claimed a counter debt as due to him of which he has given no evidence: *Rose v. Savory*, 2 New Ca. 145 (E. C. L. R. vol. 29).

Montague Smith and Prideaux, contrà.—The plaintiff is not entitled to recover the 242*l.* in this suit. The transaction as to the acceptance was a reducing of the legacy into possession by the husband. By the giving of the receipt to the executor of Mrs. Turner's will, the parties to it released him from all liability, and he ceased to have any interest in or control over the trust fund; the share of the plaintiff therefore came then, in contemplation of law, into her possession, and eo instanti became in law the vested property of her husband: *Bird v. Peagram*, 13 Com. B. 639 (E. C. L. R. vol. 76), *Carne v. Brice*, 7 M. & W. 183.† [WIGHTMAN, J.—There never was any payment of money by the executor or any one to the husband or wife. The money remained always in the hands of the defendant. The acceptance was never met, and *981] came eventually into the *defendant's possession.] As to the 200*l.*, even if there had been a statement of account, otherwise valid, the plaintiff could not have maintained this suit, because there was no consideration to support it: *Rann v. Hughes*.(a) In order to render an executor or administrator personally responsible, it is essential, not only that his promise should be in writing and signed, but that there

(a) Note (a) to *Mitchinson v. Hewson*, 7 T. R. 350.

should exist some new and sufficient consideration: Chitty, Junr., On Contracts, 6th ed., by Russell, p. 245. There was no privity in this case between the plaintiff and defendant to support the statement of an account between them. In the cases cited the statement of account was between a trustee and cestui que trust; here the defendant was not a trustee for the plaintiff, but, at the utmost, no more than a debtor to the plaintiff's trustee. [CROMPTON, J.—He had notice of all the facts: and would he not thereupon have been treated in equity as holding the money as trustee for the plaintiff?] No. But, secondly, there was no statement of an account; the account was not taken as and for the purpose of admitting a liability, and determining the amount; but only for the purpose of regulating the undertaking afterwards signed in the shape of the authority to the defendant's solicitor; and, as that was not an undertaking or authority to pay in præsentis, but when and if his wife's property should be sold, the whole matter cannot be considered as a statement of account on which the plaintiff can maintain a suit, as for an amount admitted to be due, and payable on request: *Baker v. Heard*, 5 Exch. 959;† *Irving v. Veitch*, 3 M. & W. 90;† *Middleditch v. Ellis*, 2 Exch. 623.†

*WIGHTMAN, J.(a)—I am of opinion that the rule should be discharged as to both the sums in question; and I found my [*982 judgment on the transaction at Gloucester. At that time the plaintiff was a legatee under Mrs. Turner's will for an amount represented by the sum of 242*l.*; and the legacy was the half of a debt due by the defendant to Mrs. Turner. That debt the defendant has never yet paid. It was outstanding during the whole of the life of Mrs. Hamston, the tenant for life: no money has ever been paid by any one in respect of it. It is true, that before the death of the tenant for life an arrangement was made, under which the two sisters, the meritorious legatees, and their husbands assumed to release Mrs. Turner's executor from any further liability, as to the legacies to be paid to them, and that the plaintiff's husband, also before the death of Mrs. Hamston, took an acceptance from the defendant, which he said was on account of his wife's legacy; yet no money was ever paid. I do not lay much stress upon the fact of the acceptance being taken during the lifetime of the tenant for life; I do not found my opinion on the argument raised upon that point: my opinion is founded upon the fact that no money passed, nor anything equivalent to the payment of money, by virtue of either of the arrangements I have mentioned. On the death of the plaintiff's husband the defendant resumed possession of his own acceptance; so that it seems to me impossible to say that the debt due from the defendant, which was the legacy to which the plaintiff was entitled, was ever paid either to her or to her husband; it was, at the time of the transaction at *Gloucester, still due, at all events in equity, from the [*983 defendant to the plaintiff. As to the 200*l.*, it is admitted on the one side that the defendant received and held it as executor; and, on the other, that that alone would not enable the plaintiff to maintain this action. It seems to me impossible to maintain that, if a trustee, in possession of trust money, enter into an account with his cestui que trust, and thereupon expressly state an account, and acknowledge that

(a) Coleridge, J., had gone to Chambers before the argument commenced.

he has a fund in hand applicable to the claim made on him, he does not thereupon put an end to his character of being a trustee merely, and become liable as a debtor to an action at law brought against him in his personal capacity. The dispute, therefore, in the present case, is reduced to what was the real nature of the transaction at Gloucester. I am of opinion that there was then a simple and complete statement of account, and that it was complete before the discussion arose, which did arise afterwards, as to the terms and mode of payment. The account seems to me clearly to import, upon the face of it, that it was an admission of personal liability; for it includes the item for money lent, and charges the defendant with interest. That admission of a liability to pay interest also seems to me to show that the claim mentioned by the defendant was not insisted on as a set-off at that time. It may be that the defendant might have insisted upon such a set-off by way of equitable plea in this action, if he had thought proper to raise such an issue by plea, and could have proved it. But, on the pleadings in this case, and the evidence at the trial, I am of opinion that the plaintiff was entitled to recover both the sums in dispute, either as money had and received, or as on an account stated.

*984] *ERLE, J.—It seems to me that there is not much dispute between the parties as to the law; but that it is rather as to the true complexion of the facts with regard to the law. It seems hardly to be denied, and cannot be successfully, that, if an executor have moneys from the estate in hand, and then is proved to have stated to the beneficial legatee, "I have in hand the sum which you claim, and hold it for you," he has thereby become personally liable to an action at law. The question in this case is whether the facts bring it within that rule. I am of opinion that they do. I am of opinion that the transaction at Gloucester amounted to a statement of an account, and an admission of personal liability. I am of opinion that it amounted to a stated account, and the introduction of the item for money lent seems to me to show clearly that it was intended to be the statement of an account, as due by the defendant as debtor to the plaintiff. It seems to me that there was sufficient consideration to support such an account in respect of both the sums in dispute. As to the sum of 200*l.* there can be no doubt. I had more difficulty as to the sum of 242*l.*; whether the nature of the debt had not been altered by the giving and taking of the bill of exchange; whether the defendant had not thereby become a debtor to the plaintiff's husband and released from any claim, either in law or equity, by the plaintiff, or by the representatives of Mrs. Turner. But, considering that the bill was given to the plaintiff's husband before the money it represented was in any way due to his wife, that the bill was never met but returned into the defendant's possession, and that he afterwards stated the account with the plaintiff on the footing of her claim to the money represented by the bill being as if it had
*985] *never been given, I think the statement of account can be supported, and that the case is within the proposition of law I have enunciated.

CROMPTON, J.—It may be doubtful whether the plaintiff could have maintained this action in respect of either of the sums under discussion before the meeting at Gloucester; but I am of opinion that what then took place is sufficient to support this claim in respect of both. At that

time the plaintiff was threatening the defendant with a claim at law and an arrest in respect of both sums. Upon that he stated an account with her and thereby admitted that he was personally liable as debtor to her. It was made on a claim by her, made in her own right against him as being personally liable to her, and was therefore an admission by him that he was personally liable to her in her own right. And that admission is made stronger by the introduction of the item for money lent, and by the admission that it was an account bearing interest. That admission shows that the account was stated as in respect of money of hers which had remained due to her in his hands. It seems to me that the claim put forward at the interview by him did not prevent the transaction from being a stated account against him. If it had been more prominently put forward as an adverse claim at the time of taking the account, I incline to think that on a count for money had and received, without any proof on behalf of the defendant of his claim, the plaintiff might still have relied on the statement of the account in her favour. But in this case it seems to me that there was evidence to justify the jury in saying, that there was a simple and independent and complete statement of the *account in favour of the plaintiff before the [*986 advancement of any adverse claim by the defendant; and that such claim, which was afterwards made, was then made quite independently.

Rule discharged.(a)

(a) Reported by W. B. Brett, Esq.

JAMES VEITCH v. The Trustees of the EXETER Turnpike Roads. *Feb. 12.*

V., going in a carriage from his own house to a town, drove along a parish road; he then used a private road without any express license from the owner, and by that way entered the turnpike road; he then used the turnpike road for eighty-six yards, and then by parish roads reached the town, and returned by the same route. He could not by any other route have gone to the town without becoming liable to pay turnpike tolls.

Held that, assuming that V. used this route because by using any other he would become liable to pay toll, this was not an evasion of payment of toll within stat. 3 G. 4, c. 126, s. 41, but a successful arrangement to avoid becoming liable to payment.

Per Coleridge, J.: The user at different times of portions of the turnpike road, each less than one hundred yards, but taken together more than one hundred yards, does not deprive a party of the benefit of the exemption in stat. 3 G. 4, c. 126, s. 32.

THIS was a case stated (under stat. 20 & 21 Vict. c. 43, s. 2) by justices of petty session, for the opinion of this Court, by way of appeal by James Veitch against a conviction, under stat. 3 G. 4, c. 126, s. 41, for having with a carriage gone off the turnpike road through private land, not in his occupation, with intent to evade the payment of the turnpike tolls. The case was accompanied by a plan to which reference was made in the body of it. From this plan, and the statement in the case, it appeared that Mr. Veitch could drive from his house to the town of Exeter either along the turnpike road the whole way, passing through a toll-gate, or by another line of road of nearly the same length as the turnpike road. In following this latter *line he used a parish [*987 road for some distance: then, from that parish road, he turned into a private road, over an estate called Mount Radford, leading into

the turnpike road on the Exeter side of the toll-bar; then he followed the turnpike road for eighty-four yards, and then turned into another parish road which conducted to Exeter. By no other route could he go to Exeter without using the turnpike road for more than one hundred yards, and also passing through a toll-gate. On the day in question Mr. Veitch drove to Exeter and back, using the route by the Mount Radford road both in going and coming. He thus passed along eighty-four yards of the turnpike road on his way to Exeter, and also along eighty-four yards on his way back; but, unless these two users were united, he did not use one hundred yards of the turnpike road. It appeared in the case that the Mount Radford estate had been built over, and sold in lots. Roads, including that in question, which were made over it, remained the property of the freeholder, who had granted a right of way to each purchaser of a building lot, and covenanted with him to keep the roads in repair. Subject to these grants he retained a right to exclude the public by closing the roads when he pleased: but that right was not exercised; and the roads were practically used by every one. Mr. Veitch had no title to use this road as of right.

The case proceeded as follows: "The justices determined that the Mount Radford roads were such land or ground as was intended by the 41st section of The Turnpike Act; and that the said James Veitch, by having on his return from Exeter with his carriage and horse gone off and passed from the turnpike road over the Mount Radford road, did so *988] with intent to evade the payment of the toll payable at the turnpike gate, through which he must have passed if he had not so turned off (although he had not, at the time he turned off, passed above one hundred yards on the said turnpike road), and was liable to be convicted." Then followed a statement of the application for the case.

"The questions for the opinion of the Court of Queen's Bench are: First, Whether, under the circumstances above stated in the case, the Mount Radford roads are such land or ground near or adjoining to a turnpike road as are mentioned and intended in and by sect. 41 of The Turnpike Act, so as to render the said James Veitch liable to a penalty for an intended evasion of the payment of the toll for going off and passing from the turnpike road through and over the Mount Radford road; Second, Whether the said James Veitch, not having, at the time he went from the said turnpike road into the said private road, passed above one hundred yards on the said turnpike road (unless the going to Exeter and the returning from be added together), was liable to the payment of any toll."

Karslake now argued in support of the conviction.—Stat. 3 G. 4, c. 126, s. 41, imposes the penalty upon any person passing "from any turnpike road, through or over any land or ground near or adjoining thereto (not being a public highway, and such person not being the owner or occupier or servant or one of the family of such owner or occupier of such land or ground), with intent to evade the payment of" turnpike tolls. Sect. 32 exempts from tolls, *inter alia*, "horses or carriages which shall only cross any turnpike road, or shall not pass above *989] one hundred yards thereon." But this exemption does not apply if the party commits an offence by evading the toll. It is possible to suppose a party riding for less than one hundred yards along

a turnpike road, and then, when very near the toll-bar, leaping the hedge with the intention of passing behind the toll-bar: he would incur the penalty the moment he leapt the hedge. [CROMPTON, J.—Probably he would. But Lord Lyndhurst, when Chief Baron, in several revenue cases said that a person, so shaping his proceedings as to avoid becoming a debtor to the Crown for duties, could not be said to evade the statute imposing them. In the present case Mr. Veitch seems to have done no more than select a particular road because it was toll free.] The intention to evade is found as a fact by the justices. The doubt in their minds seems to have been the nature of the Mount Radford road, and the small portion of the turnpike road actually used: if, consistently with these, the offence might exist in law, they find it did in fact.

Coz, *contrà*, was not called upon to argue.

COLERIDGE, J.—The appeal must be sustained, as the penalty has not been incurred. No doubt the justices have stated in the terms of sect. 41 that Mr. Veitch has passed over land (not a highway nor in his own occupation) with intent to evade the toll. But we must give a reasonable construction to the whole case; and, doing so, it is plain that the justices mean to say that he intended to avoid paying the toll, and ask us if that is in law an evasion. The real question is, whether the circumstances stated in the case bring this under the Act. Now, if we read sects. 41 and 32 together, it is clear that they do not; and I think we cannot leave sect. 32 out of consideration in construing sect. 41. The enactment is, that no man shall be subject to toll unless he [*990 passes along the turnpike road for one hundred yards; and, if, passing along so as to become liable, he turns off so as to evade the payment of the toll, he is liable to a penalty. But the present case is not that of a man who has used the turnpike road and evades paying the toll to which he is fairly liable, but of a man who, wishing to avoid becoming liable to toll, fairly contrives to use so little of the turnpike as never to be liable. That is not within the Act; he has succeeded in his object.

WIGHTMAN, J.—Sect. 32 exempts from toll those who do not pass along the turnpike road for one hundred yards. Sect. 41 provides that if any person goes off the turnpike road with intent to evade the payment of tolls he shall be subject to a penalty. Now the justices find in terms that the appellant did go off for the purpose of evading the tolls; but that must be understood with reference to the circumstances found. I agree in the distinction between evading payment of a toll, and avoiding using the road so as to become liable to the toll. The appellant may very well have taken this road because he wished to avoid paying toll; but it may also have been the way he preferred. Is he bound, if he goes along the turnpike road for eighty yards, to go out of the way he prefers in order to pay toll? I think not. It is not like a case of avoiding the toll-bar to evade payment of a toll fairly incurred. Many cases may be suggested in which it would be more or less doubtful whether there was an evasion; but in this case, though he intended to avoid paying the toll, yet, as he never did so use the road as to incur it, he has committed no offence.

*ERLE, J.—No toll is imposed on any one if he uses less than [*991 one hundred yards of the turnpike road. The appellant has contrived to use only eighty-four yards, and then turned off. He has,

therefore, avoided using the road so as to become liable to toll. That is how I read the facts.

CROMPTON, J.—In going to Exeter, the case is clear, the appellant did nothing to make him liable. The justices find that, when returning, he turned off the turnpike with intent to evade the toll. But, on looking at the whole case, we must construe this as meaning, at the highest, that he took another road with the object of avoiding the toll: and we must not construe the section as imposing a penalty on persons who avoid using the turnpike. It seems to me here that he did no more than fairly cross the road within the meaning of sect. 32, which he had a perfect right to do. A case was suggested, in the argument, of a horseman leaping the fence out of the turnpike road, so as to pass behind the toll-house, and returning to the road again, and yet not using one hundred yards of the road in all. It is possible to do this, though the case is not very likely to occur; but, if it does, probably the facts will be found to amount to an evasion. In the present case they do not.

COLERIDGE, J.—I may as well say, to avoid leaving a doubt, that in my opinion distinct users of different fragments of turnpike road, each less than one hundred yards, in crossing a turnpike, cannot be tacked together so as to make up a user of more than one hundred yards within sect. 32.(a)

Appeal allowed.

(a) See *Gerrard v. Parker*, 7 E. & B. 498 (E. C. L. R. vol. 90).

*992] *WILLIAM CHRISTIE, Appellant, v. The Guardians of the Poor of the Parish of St. LUKE, CHELSEA, in the County of MIDDLESEX, Respondents. Feb. 23.

A case having been stated by justices under stat. 20 & 21 Vict. c. 43, a rule obtained by the appellant, calling on the respondents to show cause why it should not be sent back to the justices to set forth the grounds of the determination more fully, was discharged. *Semble*, that, unless something appeared equivalent to a refusal on the part of the justices to state the case, the practice should be to apply to the Court at the time of the argument to send the case for amendment if it then appears to them to be defective.

Under the Metropolitan Local Management Act (18 & 19 Vict. c. 120), a precept was directed by the Metropolitan Board of Works to the vestry of a parish to raise a sum of money, as being the proportion chargeable on the parish for the expenses of the Board. The vestry made a precept directed to the overseers of the parish, requiring them to make a rate for that purpose. By a local Act, the affairs of the poor of the parish are committed to guardians. The precept was delivered to the Guardians, who made a rate in obedience to it, signed by their own names.

Held that the Guardians were overseers within the Act, and the rate was not objectionable on these grounds.

The rate did not state on the face of it the issuing of the precepts.

Held that the rate was sufficient, though not showing on the face of it the source of the authority of those who made it.

THE following case was stated for the opinion of this Court under stat. 20 & 21 Vict. c. 43.

On 3d March, 1857, the Metropolitan Board of Works, under the powers conferred by stat. 18 & 19 Vict. c. 120 (the Act for the better local management of the Metropolis), made an assessment on that part of the parish of St. Luke, Chelsea, which was, at and immediately before the determination or expiration of The Metropolitan Sewers Act, 1848

(11 & 12 Vict. c. 112), included in the Counters Creek separate sewerage district, of the sum of 1265*l.* 12*s.* 3*d.*; and on the 18th day of March issued their precept to the vestry of the said parish, of which precept the following is a copy: "To the vestry of the parish of Chelsea, in the county of Middlesex. By virtue of an Act passed in the 19th *year of the reign of Queen Victoria, intituled An Act for the better local management of the Metropolis: The Metropolitan [998 Board of Works do issue this, their precept, under their common seal to you, the said vestry, and do hereby require you to pay to The Bank of London, Threadneedle Street, in the city of London, treasurer and banker of the said Board, on or before the 30th day of May now next ensuing, the sum of 2264*l.* 19*s.* 9*d.*: the sum of 999*l.* 7*s.* 6*d.*, part of the said sum of 2264*l.* 19*s.* 9*d.*, being the sum which ought in the judgment of the said Board to be charged upon the whole of the said parish, for defraying the expenses of the said Board in the execution of the said Act, and which they the said Board did, on the 3d day of March, 1857, ascertain and assess upon the said parish for such purpose, under and in pursuance of the provisions of the said Act in that behalf; the sum of 1265*l.* 12*s.* 3*d.*, other part of the said sum of 2264*l.* 19*s.* 9*d.*, being the sum which ought in the judgment of the said Board to be charged upon that part of the said parish of Chelsea which was, at and immediately before the determination and expiration of The Metropolitan Sewers Act, 1848, included in the Counters Creek separate sewerage district, for defraying the expenses of the said Board in the execution of the said Act, and which they the said Board did, on the 3d day of March, 1857, ascertain and assess upon the said part of the said parish for such purpose, under and in pursuance of the provisions of the said Act in that behalf. Dated the 18th day of March, 1857, by order of the Board." Signed and sealed, "E. H. WOOLRYCH, Clerk of the Board." The vestry to which this precept was directed has been duly elected and constituted under *the Act referred to: and, on the 17th day of [999 March following, that vestry duly made and issued their precept, of which the following is a copy: "Precept for 2264*l.* 19*s.* 9*d.*: To the overseers of the parish of Chelsea. The vestry of the parish of Chelsea having received a precept from the Metropolitan Board of Works, of which the following is a copy:" the precept from the Metropolitan Board was then set out verbatim. "In pursuance of the above precept, you are hereby required to levy upon the whole of this parish the sum of 999*l.* 7*s.* 6*d.*, and to levy upon that part of the parish only which was, at and immediately before the determination and expiration of The Metropolitan Sewers Act, 1848, included in the Counters Creek separate sewerage district, the further sum of 1265*l.* 12*s.* 3*d.*, which two sums, amounting in the whole to 2264*l.* 19*s.* 9*d.*, are for the purpose of defraying the expenses of the Metropolitan Board of Works, in the execution of the Act passed in the 19th year of the reign of Queen Victoria, cap. 120, intituled An Act for the better local management of the Metropolis. And you are further required to pay the said amount of 2264*l.* 19*s.* 9*d.* to the treasurer of this vestry, on or before the 29th day of May next, under and in pursuance of the provisions of the said Act in that behalf. Dated this 17th day of March, 1857. By order of the vestry." (L. S.). Signed "CHARLES LAHEE, vestry clerk." By stat. 4 & 5 Vict. c. xvii.,(a)

(a) Local and personal, public: "For the administration of the poor-laws in the parish of St. Luke Chelsea in the county of Middlesex, and relating to the highways in the said parish."

and by virtue of an order of the Poor Law Commissioners made thereunder, the administration of the laws for the relief of the poor in that parish was and is vested in the Board of Guardians, *who, under

*995] the 7th, 12th, and 18th sections of that Act, alone have the power of making and levying the poor-rates in that parish. The Guardians, therefore, are included in the term "overseers of the poor" in the Metropolis Local Management Act, which, by section 250, provides that the expression "overseers of the poor" "shall include any persons authorized to make and collect or cause to be collected the rate for the relief of the poor in any parish." The order of the vestry was therefore duly served on the Guardians: and on the 25th day of March, 1857, in pursuance of that order, the Guardians made a rate on that part of the parish included in the Counters Creek separate sewerage district, for the payment of the said sum of 1265*l.* 12*s.* 3*d.*, of the heading and title of which the following is a copy: "A rate or assessment of 1*s.* 1*d.* in the pound upon that part of the parish of St. Luke, Chelsea, in the county of Middlesex, which was, at and immediately before the determination and expiration of The Metropolitan Sewers Act, 1848, included in the Counters Creek separate sewerage district, for defraying the expenses of the Metropolitan Board of Works in the execution of the Act passed in the 18th and 19th years of the reign of Her Majesty, Queen Victoria, intituled An Act for the better local management of the Metropolis; made this 25th day of March, 1857." In this rate the appellant was rated and assessed in due form at and in the sum of 29*l.* 3*s.* 1½*d.* in respect of property occupied by him within the Counters Creek district; and at the end of the rate was a declaration signed by the said Guardians, of which the following is a copy: "We, the Guardians of the poor of the parish of St. Luke, Chelsea, in the county of Middlesex, do declare the several particulars specified in the

*996] *respective columns of the above sewers-rate to be true and correct, so far as we have been able to ascertain them; to which end we have used our best endeavours. Dated this 8th day of April, 1857. THOMAS SYMONS, W. B. CRABB, ABEL BIRCH, CALSB COLLIER, JAMES MILES, GEORGE YAPP." This rate was afterwards, on the same 8th day of April, duly allowed and signed by Mr. Paynter, one of the police magistrates of the metropolis, within whose district Chelsea lies, and was duly published on the 12th day of April. Payment of this having been duly demanded of the appellant, William Christie, and he having refused payment, a complaint was, on the 3d day of September, laid before F. Chalmer, Esquire, one of Her Majesty's justices of the peace for the county of Middlesex, who thereupon issued his summons against the appellants. (The summons was set out in the case; but nothing turned upon its form.) The summons came on for hearing before two justices on the 17th day of September, when it was adjourned till the 15th day of October, when the same was heard before Edmund Edward Antrobus, Esq., Francis Chalmer, Esq., and James Hobbert Wilson, Esq., three justices of the peace for Middlesex, at the place mentioned in the summons. Upon those occasions it was objected, on behalf of the appellant, that the assessment mentioned in the precept ought to be produced; but the justices declined to require this. It was also objected that the rate was invalid, inasmuch as the order of vestry was addressed to the overseers, whereas the Guardians were the only

persons authorized to make the rate; also that the rate was bad on the face of it, in not reciting the precept, and showing the authority of the parties making it; also that the rate was excessive, *regard not having been had to the benefit derived from the expenditure [997 under the 170th section of the Metropolis Local Management Act; and the precept of the Metropolitan Board of Works was bad for the same reason, and vitiated the rate. No evidence was given on behalf of the appellant on the point. The justices overruled these objections, and held that the objection on the score of the rate being excessive, was one they could not entertain, and that it ought, if available at all, to have been raised by appeal. They therefore adjudged and ordered the appellant to pay the said rate. Thereupon the appellant, within three days, being dissatisfied with this determination, as being erroneous in point of law, applied in writing to state and sign a case pursuant to the statute made and passed in the session of Parliament holden in the 20th and 21st years of the reign of Her present Majesty, intituled "An Act to improve the administration of the law so far as respects summary proceedings before justices of the peace," for the opinion of the Court of Queen's Bench; and, the appellant having entered into his recognisances as provided by that statute, conditioned to prosecute such appeal and submit to the judgment of that Court, and pay such costs as might be awarded by the same, the said justices have accordingly stated and signed the above case.

Keane, in last Michaelmas Term, had obtained a rule calling on the respondents to show cause "why the case should not be sent back to the justices for amendment, in order that the grounds of their determination may be set forth where the same are not set forth, and that the objections taken before them may be all and fully stated, and that the rate in the case named may be fully and *correctly described [998 in respect of the parties by whom the same purports to be made; and that the proceedings at the hearing and the adjourned hearing in the case mentioned may fully and correctly appear on the face thereof." The rule was obtained on an affidavit; and an affidavit was filed in answer; but the decision of the Court did not turn upon the facts. In last Hilary Term, (a)

Dowdeswell showed cause.—[CROMPTON, J.—I do not see how this rule can be made absolute. By stat. 20 & 21 Vict. c. 43, s. 7, the Court for whose opinion the case is stated may, if they think fit, send a case back for amendment. That applies if, upon argument, the case is found to be imperfect. Under sect. 5, there is power given to the Court of Queen's Bench, when the justices refuse to state a case, to grant a rule calling on the justices and the respondent to show cause why the case should not be stated, and to make that rule absolute. Probably, if the justices stated a case leaving out material facts, and on application refused to amend the case by inserting them, it might be equivalent to a refusal: but here there has been no application to the justices to insert the facts; and they are not parties to the rule. Lord CAMPBELL, C. J.—It would be the more convenient practice, where there is a dispute as to whether the case is sufficiently explicit, to let it come on for discussion first; and then, if the Court think it defective, they may send

it back for amendment. Cases in which the justices have refused to state a case, or where there has been a perseverance in stating an imperfect case, so as to be equivalent to a refusal, would stand on a different ground.]

*999] *Keane* was heard in support of his rule, but did not show any application to the justices to set out the statements which he wished to be inserted in the case.

Per CURIAM.(a)

Rule discharged.

The case came on for argument in this Vacation.(b) *Keane*, for the appellant, again, in the course of the argument, urged that the case should be sent back, in order that the justices might set forth fully the grounds on which they overruled the objections; but the Court were of opinion that, though it might in general be desirable in cases to state the grounds of a determination, it was unnecessary here, as from the nature of the case it appeared that the objections were overruled because the justices thought them not tenable in point of law. *Hugh Hill*, for the respondent, admitted that the persons who made the rate, and who were in fact, at the time of the making of the rate, Guardians of the poor of the parish of St. Luke, Chelsea, signed it by their own names, in the same form as they did the declaration, without adding to their signatures their designation as Guardians. By consent it was ordered that the case should be amended, by adding these signatures to the rate as set out, and inserting a statement that the persons signing were de facto Guardians. On the case thus amended the argument proceeded.

*1000] *Keane*, for the appellant.—The rate is bad upon the *face of it. The whole authority of persons acting within a limited power should appear on the proceedings: *Regina v. Eastern Counties Railway Company*, 5 E. & B. 974 (E. C. R. L. vol. 85). Here it does not appear on the face of the proceedings that the parties making it had any authority to levy it. Under stat. 18 & 19 Vict. c. 120, ss. 158, 159, 160, and 161, provisions are made under which the overseers of the poor of any parish may make and collect three different kinds of rate for defraying the expenses of the vestry or district board, if so ordered by the vestry or district board; and provisions for enforcing them are contained in sects. 162 to 169. By sect. 170 the Metropolitan Board of Works may make an assessment on the several districts, and, under sect. 172, by their precept direct the vestries and district boards to pay the sums assessed on them; and, by sect. 174, all sums which any vestry or district board may be required to pay by such precepts shall be paid, and shall be raised in like manner as if the same were required by the vestry or board for defraying their expenses under the Act. Thus the question comes back to the previous sections, 158 to 169. It therefore appears by the Act that rates may be made by the overseers under this Act for different objects. On the face of this rate it is made by individuals whose character does not appear on it; and, even if it did, they are Guardians, not overseers. Besides which, the purpose for which the rate is stated to be made is one for which even overseers could not make a rate unless there were an order of the Metropolitan Board of Works, and a precept directed to them. The precept here, in fact, is directed to the over

(a) Lord Campbell, C. J., Wightman and Crompton, Js.

(b) Friday, February 12th. Before Coleridge, Wightman, Erle, and Crompton, Js.

seers; but the rate is made by the *Guardians. Moreover, it ought to appear on the face of the rate that there were such orders and precepts as to give jurisdiction to make the rate. [*1001

Hugh Hill, contrà.—All that the justices at petty sessions were to do was to see that a case was made out showing that they had jurisdiction to issue the distress warrant. By stat. 18 & 19 Vict. c. 120, s. 250, the word “overseers of the poor” “shall include any persons authorized to make and collect or cause to be collected the rate for the relief of the poor in any parish.” Therefore the Guardians of the poor in this parish are overseers within the meaning of the word as used in the Act; and the objection, founded upon the supposition that the words mean different things, fails. Then, the persons making the rate and signing it being de facto Guardians, and intending to make it as such, the rate is as valid as if they had added that word to their signatures. As to the more substantial objection to the rate. It is true that a rate must show the object for which it is made, and the authority by which it is made; but it need not show more. No rate ever does show the devolution of authority. [CROMPTON, J.—The rule in judicial proceedings is that the root of the special authority acted on must be shown. When Manchester was incorporated, I had to settle the forms of the rates for the new borough in consultation with Mr. Starkie. He thought it necessary to make the forms such that the source of the authority should appear upon them; and he considered it not safe to stop short of a reference to the Act by virtue of which Manchester was incorporated. A great deal of trouble was taken to do this, it may be unnecessarily; but a very learned person thought it not safe to do less. *WIGHTMAN, J.—The [*1002 duty of the overseers seems to be merely ministerial; they are to obey the precept, and not to act without it: should not they refer to it in the rate?] No case shows that the principle laid down in *Christie v. Unwin*, 11 A. & E. 873 (E. C. L. R. vol. 39), extends to anything not judicial in its nature. There is no practical object in requiring that a rate such as this should contain an express recital of a precept that is implied from the statement of the purposes for which it is levied under this Act.

Keane was heard in reply.

Cur. adv. vult.

CROMPTON, J., now delivered the judgment of the Court.

On the argument in this case three points were made. The first was, that the precept should have been directed to the Guardians of the poor, whereas it was directed to the overseers of the poor. The second, that the rate was not signed as Guardians by those making it. But both were satisfactorily answered. The Guardians are overseers under this Act; and the persons making the rate were in fact guardians, and made and signed the rate in that capacity. A third objection of a more serious nature was raised: upon that we took time to consider. By the provisions of this Act, before a rate can be made for these purposes, it is necessary that there should be a precept from the Metropolitan Board of Works to the vestry to raise the amount required, and another precept from the vestry to the overseers. These precepts did exist; but that does not appear on the face of the rate. It was said the rate was void [*1003 on this account. On consideration we think that this objection also fails. We wish not to be understood to say that in a conviction, or other judicial proceeding, it is not necessary to trace the authority under

which it is made from its source on the face of the proceedings. But we find no authority, and none was cited on the argument, showing that in a rate more is required than to show the purpose for which it is made. By this Act the rate is to be made in the same manner as if it was for the relief of the poor; and it is so made, stating explicitly the purpose for which it is made. The only case which we have found bearing upon the subject is that of *Rex v. The Mayor, &c., of Gloucester*, 5 T. R. 346. There it was not suggested that it was necessary on the face of the rate to go to the source of the authority under which it was made. The objection in that case would have been decisive: but it does not appear to have occurred to either the Bench or the Bar that it was tenable. We are not at all inclined to make a precedent for the first time raising such an objection to a rate. Judgment for respondents.

*1004] *SAMUEL CUNLIFFE LISTER and GEORGE EDMUND
DONNISTHORPE v. GEORGE HENRY LEATHER.
Feb. 23.

A patent for a combination does not import a claim that each of its parts is new; and the patent may be valid though each part is old: but:

Held by the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, that the use of a subordinate part only of a combination may be an infringement of a patent for the combination if the part so used be new and material.

THE declaration contained one count for the infringement of two patents, both for "Improvements in preparing and combing wool and other fibrous materials." There were averments that the first patent was granted, on 20th March, 1850, to the plaintiffs as the inventors; and that the second was granted, on 2d February, 1852, to the plaintiff Lister and James Ambler as the inventors; and that the interest in the second patent was, before the breaches, vested by assignment in the plaintiffs.

Pleas. 1. Not guilty. 2. To so much as complained of the user of the invention in the patent of 1850, a denial of the granting of that patent. 3. To ditto, that plaintiffs were not the first inventors. 4. To ditto, that the invention was not a new manufacture. 5. To ditto, that there was no sufficient specification. Pleas 6, 7, 8, and 9 were similar to pleas 2, 3, 4, and 5, but addressed to the user of the invention in the patent of 1852.

The particulars of plaintiffs confined their complaint to the user by defendant of a machine known as Crabtree's machine, which was alleged to be an infringement of their inventions. The defendant delivered notices of objection. A Judge on summons made an order that the defendant should deliver further and better particulars, and be precluded from giving evidence at the trial of any objection not specified in them.

*1005] The amended notice of objections, besides stating in general terms want of novelty, gave notice that the said inventions were, prior to the granting of the plaintiffs' patents, published by various scientific books named, and also by the specifications of letters patent granted to several persons named. "And also the several other specifications respectively enrolled or filed in Chancery in pursuance of the several

other letters patent granted to the plaintiffs and to each of them respectively between the 1st January, 1840, and the 20th March, 1850."

On the trial, before Erle, J., at the Chelmsford Summer Assizes, 1856, the plaintiffs gave in evidence their specifications and their disclaimers; and, to explain them, called many experts, and exhibited models. From this evidence it appeared that one great object in wool combing was to separate the long fibres of the wool from the short, and both from the dirt: this originally was done by hand; but much very ingenious and complicated mechanism had been at different times invented for the purpose of effecting it by machinery. The specifications of plaintiffs, assuming that the mode of wool combing then in use was known, described complex machinery for improving the process. The general mode in which this was done is stated in the judgment of this Court. (a) *It is sufficient for the purpose of this report to state that it appeared that, in 1846, Josué Heilmann had taken out a patent [*1006 for some improvements in wool-combing machinery. The invention of the plaintiffs could not be used without infringing Heilmann's patent by using his invention or a mechanical equivalent to it. The plaintiffs, finding this to be so, purchased Heilmann's patent for 30,000*l.*, and amended their specification with the intention of disclaiming, *inter alia*, those parts of the original specification which were parts of Heilmann's invention. The great question of fact at the trial was as to whether this had been sufficiently done; the plaintiffs, in effect, contending that, though Heilmann's invention was a necessary part of their improved machine, yet the great practical benefit was from their additional inventions; and that the reason why they paid Heilmann so large a sum of money for his invention was because he was entitled during the whole term of his patent to prohibit the use of the plaintiffs' inventions, though he could not use them himself. The case of the defendant on this was that Heilmann's invention was the substantial improvement; and that, on the expiration of his patent, it was free to the defendant to use it. Crabtree's machines, which were used by the defendant, were equivalent in effect to some important parts of the machine described in the plaintiffs' specifications; but not to every part of it. One disputed fact was whether these parts used by the defendant were new or not. On the main questions of fact, namely, whether the plaintiffs' improvements on Heilmann's machine were substantially useful novelties, and whether the new parts of the plaintiffs' invention were used by the defendant, the evidence, in the opinion of the Judge who tried the *cause, and of this Court, after hearing it discussed, was strongly in favour [*1007 of the plaintiffs. Besides this principal ground of defence, the defendant gave in evidence several prior specifications of the plaintiffs for different improvements in wool combing. The object for which these

(a) The specifications assumed in the reader so much knowledge of the existing mechanism that the description given in them is unintelligible without the assistance of skilled witnesses explaining the process with the aid of models. It would therefore be useless to set them forth in the report. For the convenience of those who may wish to refer to the specifications mentioned in the judgment, the numbers under which the specifications are enrolled are here given.

No. 13009. Specification of Samuel Cunliffe Lister and George Edmund Donnisthorpe, enrolled in 1850, with a disclaimer of part dated 28th June, 1856.

No. 13950. Specification of Samuel Cunliffe Lister and James Ambler, enrolled in 1852, with a disclaimer of part, dated 28th June, 1856.

No. 11103. Specification of Josué Heilmann, enrolled in 1846.

were used was to show that the machinery described in the specifications of the patents, on which the action was brought, comprised several matters which had been already made the subject of patents, and so published; and on these the defendants raised a point on the construction of each of the specifications, on which this action was brought, which point, in substance, was that the plaintiffs were in a dilemma; for that, if the specifications claimed to monopolize each of the subordinate parts of the machine described, the patent was void unless each of those subordinate parts was novel; and if, on the other hand, the claim was only to monopolize the combination, the defendant, who had not used the whole combination, but only important subordinate parts, were not guilty of an infringement of the invention as described in the specification. The defendant also tendered in evidence a specification of plaintiffs not specifically named in the notice of objections, on the ground that it was referred to in the specification of one of the patents in issue. The Judge refused to receive the evidence. The trial occupied a very long time; and the Judge summed up at great length. The substance of his direction, according to the view this Court took of it, sufficiently appears in the judgment of the Court. The view which defendant took of it may be collected from the grounds inserted in the rule Nisi. Verdict for plaintiffs.

*1008] *In the ensuing Term, Sir A. G. E. Cockburn, Attorney-General, obtained a rule to show cause why the verdict should not be set aside and a new trial had. The grounds stated in the rule were as follows: "For misdirection and rejection of evidence at the trial, and the verdict being against the evidence, upon the following grounds. 1st. That the learned Judge ought to have left it to the jury to say whether the machinery specified by the plaintiffs under their patent of 1850 was not the same as that specified by Heilmann under his patent of 1846, and have directed them that, in the event of their finding the question in the affirmative, the verdict should be for the defendant as to the patent of 1850. 2d. That the learned Judge ought to have left it to the jury to say what part of the machinery specified by the plaintiffs under their patent of 1850 was not the same as the corresponding part of the machinery specified by Heilmann under his patent of 1846, and have directed the jury that, in the event of their finding in the affirmative, the verdict should be for the defendant as to the patent of 1850. 3d and 4th. Like objections as to plaintiffs' patent of 1852. 5th. That the Judge ought to have left it to the jury to say whether the machinery specified under the plaintiffs' patent of 1852 was not, in whole or in part, the same as the machinery specified under the plaintiffs' patent of 1850 and 1851, or either of them, and have directed them that, in the event of their finding the fact in the affirmative, their verdict should be for the defendant as to the patent of 1852. 6th. That the learned Judge directed the jury that the plaintiffs' patent of 1850 was for a combination of subordinate parts. 7th. That the learned*

*1009] *Judge directed the jury that, if the combination patented by the plaintiffs comprised subordinate parts or combinations, the use by the defendant of either of such subordinate parts or combinations would be an infringement of the plaintiffs' patent. 8th. That the learned Judge directed the jury that, if the combination patented by the plaintiffs consisted of subordinate parts or combinations, of which*

one was old and one new, the use of such new subordinate part or combination would be an infringement of plaintiffs' patent. 9th. That the learned Judge directed the jury that neither of the specifications of the patents in issue claimed any of the parts of the machinery they described, nor claimed anything comprised in any of the previous specifications given in evidence; and that those previous specifications did not prove any want of novelty in either of the plaintiffs' inventions. 10th. That the learned Judge directed that each of the plaintiff's patents might be good, although any part of the combination of machinery, described in the specification, was substantially the same as machinery described and comprised in the specification of Heilmann's prior patent; and also that, if the second part of the combination of the machinery described in the specification of the plaintiff's patent of 1850, consisting of a subordinate combination for cleaning the second half of a tuft of wool, was new at the date of that patent, the patent might be sustained; and that if the defendant had used that part he had infringed the patent. 11th. That the learned Judge ought to have directed the jury that, if the plaintiff's patent was for a combination of subordinate parts or combinations, the infringement of the entire combination must be proved in order to support the action; and that, unless *such infringement [*1010 of the entire combination was proved, the defendant was entitled to the verdict. 12th. That the learned Judge ought to have directed the jury that, if the plaintiffs' patent was for a combination of subordinate parts or combinations, and either of such subordinate parts or combinations were old, or patented as a specific invention under a prior or subsisting patent, the verdict must be for the defendant on the ground of want of novelty. 13th. That the learned Judge directed the jury that the depositing and accumulating half-cleaned tufts of wool on a travelling comb to be drawn off was the invention patented by the plaintiff in his patent of 1850; and that, if the defendant had used it, he had infringed the patent. 14th. That the learned Judge directed that each of the plaintiffs' inventions was a combination of machinery for taking a half-combed tuft of wool, and depositing it on a travelling comb, with the woolly end inside to be drawn off in the usual way; and that the infringement of the new part of that combination was an infringement of the plaintiffs' patent. 15th. That the learned Judge directed the jury that the part of the invention described in the plaintiffs' specification of 1852, which was shown in figure 5 of the drawings, might include and apply to a combination of machinery, partly consisting of screw gills, and a comb to detach and draw the wool through gill combs, and deposit it upon another comb to be drawn off. 16th. That the learned Judge directed that, in considering the sufficiency of the plaintiffs' specification of 1852, a mechanic reading that specification must be considered to know that former specifications are referred to, furnishing descriptions of the other parts of the machine to which the invention was to be applied. 17th. That the *learned Judge [*1011 ought to have directed the jury that the plaintiff's patent of 1852 included the same combinations as those of 1850 and 1851, and could not be sustained. 18th. That the learned Judge ought to have directed the jury that, if the plaintiffs' patent of 1850 included the defendant's machine, the plaintiffs' patent of 1852 could not be sustained. 19th. That the learned Judge rejected the evidence of the

specifications of other patents of the plaintiffs. 20th. That the learned Judge improperly rejected office copies of the specifications of prior patents granted to the plaintiffs respectively, which were tendered in evidence by the defendant. 21st. That the mere user of machines made before the date of the disclaimers did not amount to any infringement of either of the patents."

In Hilary Term, 1857, Sir *F. Thesiger*, *Bovill*, *Lush*, and *Webster* showed cause, and *Chambers*, *Hindmarch*, and *H. Lloyd* were heard in support of the rule. (a) The argument as to the legal points was necessarily much mixed up with that as to the construction of the specification; and the points raised sufficiently appear by the judgment of this Court. (b) *Cur. adv. vult.*

*1012] *Lord CAMPBELL, C. J., in Easter Term, 1857 (April 27), delivered the judgment of the Court.

In deciding whether there should be a new trial in this case, on the ground either of misdirection or that the verdict was against the evidence, it has been necessary to consider the separate issues, the effect of the evidence applicable to each, and the statement of the law applicable to each laid down by the Judge.

With respect to the patent of 1850, the issues tried were on the novelty and on the infringement. As to these issues the plaintiffs gave evidence of the specification of 1850, together with the disclaimer of 1856. The patent was "for improvements in preparing and combing wool and other fibrous materials;" and the amended specification claimed, as the invention, a new combination of mechanism for the purpose of effecting a new or improved process for preparing and combing wool. In order to explain to those not conversant with the manufacture such a claim of invention of improvements it was necessary to give, and the plaintiffs accordingly gave, evidence of the nature of the manufacture, and the course of improvements therein, prior to the plaintiffs' patent; viz. that the object of the manufacture is to remove the noil, or dirt, and short fibres from wool, and to make the long fibres into a sliver, from which the thread is spun; and that this object was originally effected with a lashing process, at first by hand, and then by a series of mechanisms, improved by inventors, of whom Cartwright, Preller, Ross, and Baring were adduced as examples; then with a nipping process, instead of lashing, invented by Heilmann, in 1846; and that his process was followed by improvements by other inventors down to the process claimed *1013] by the plaintiffs as their invention *in 1850. In this process a tuft is detached from the lap of wool, by nipping, and the tail half of the tuft is cleaned in detaching; then this tuft is placed in such

(a) On the 19th, 20th, and 21st January, 1857, before Lord Campbell, C. J., Coleridge, Wightman, and Erle, Js.

(b) The following authorities were referred to in the course of the argument: *Sellers v. Dickinson*, 5 Exch. 312;† *Newton v. Grand Junction Railway Company*, 5 Exch. 331;† *The Electric Telegraph Company v. Brett*, 10 Com. B. 838 (E. C. L. R. vol. 70); *Smith v. London and North Western Railway Company*, 2 E. & B. 69 (E. C. L. R. vol. 75); *Morris v. Branson*, Bal. N. P. 76 c; *Caldwell v. Vanvlissengen*, 9 Hare 415; *Holmes v. The London and North Western Railway Company*, 12 Com. B. 831 (E. C. L. R. vol. 74); *Perry v. Skinner*, 2 M. & W. 471;† *Allen v. Rawson*, 1 Com. B. 551 (E. C. L. R. vol. 50); *Regina v. Mill*, 10 Com. B. 379 (E. C. L. R. vol. 70); *Kay v. Marshall*, 5 New Ca. 492 (E. C. L. R. vol. 35); *Tetley v. Barton*, 2 E. & B. 956; *Haworth v. Hardcastle*, 1 New Ca. 182 (E. C. L. R. vol. 27); *Russell v. Cowley*, 1 C. M. & R. 864;† *Carpenter v. Smith*, 9 M. & W. 300;† *Hill v. Thompson*, 3 Mer. 622.

a position that, by drawing off, the head half is also cleaned, and a good sliver is procured.

The specification shows a combination of mechanical parts that will perform this process, viz. a comb for carrying in the uncombed wool; nipping means to detach the tuft and thereby clean the tail half; transferring means to place this half-cleaned tuft on a comb for carrying out, with the uncleaned head on one side of the teeth, and the clean tail on the other side; conjoined to such mechanism there must also be feeding rollers, to supply lap to the carrying in combs, and drawing off rollers, to take hold of the clean tail of the tuft, and draw the uncleaned head through the teeth of the carrying out comb, and to deliver off the long fibres in sliver.

The diagrams show screw gill combs for carrying in; a circular comb for carrying out; a bar, dropping from a rotating cylinder on an endless apron, for nipping and detaching, and a porter brush for transferring and placing on the comb for carrying out. But these diagrams are only one example of the mechanism by which the process can be performed. They show the invention carried into actual practice in one form, with all the details for applying the moving power, and making the required movements in the required order, and with the required effect; but the specification does not represent the claim to be confined to the machine in the diagrams: on the contrary it in effect declares that, though screw gill combs are there used to carry in, yet the patent extends to every other form of comb which will carry *in and perform that move- [*1014
ment in the process to which the patent relates; and also that, though circular combs are shown for carrying out, yet any other form of comb, suitable to that movement in the process, is within the patent. The process combines five movements of the wool to be made in a certain order: viz. 1, carrying in; 2, detaching; 3, transferring; 4, depositing; and 5, carrying out: each producing a certain change, and the total of the changes resulting in a product of a good sliver from uncombed wool; and the mechanism combines all the subordinate mechanisms that make these movements in their order. The patent is for the whole combination of mechanism, for performing the whole process, as described in the specification.

If it is objected that this claim appears complex and indefinite, the answer is, that the objection applies to every existing patent for improvements in complex machines for manufactures of skill; and probably will apply with increasing force hereafter, in proportion as manufacturing skill increases. Still such an indefinite complexity is seeming rather than real; it is a difficulty for those who are unacquainted with the subject; but, by those who are daily conversant either with the making or the working of those machines, the least improvement can be as certainly appreciated as a change of substance by a chemist.

Then, was this invention new? The plaintiffs' evidence was strong to show that they had invented an improvement beyond all the machines for the process of combing which had preceded it; the nature of the improvement being tested by the cost of production and quality of product. The defendant, in answer, gave much evidence concerning the nature of inventions *by Preller, Baring, and Ross; but, as these [*1015 inventions preceded Heilmann's in 1846, whose improvement was so great as to have caused a revolution in the manufacture, they

were not much relied on in this part of the case. But the great stress, at both trials, and on the argument, has been laid on Heilmann's invention, of which a model was produced here and explained. In respect of this invention two questions were raised, one of fact for the jury, that is, Was the plaintiffs' invention, taken as a whole, substantially the same as Heilmann's? and one of law, for the Court, in respect of Heilmann's nipping process, to be hereafter mentioned.

With respect to the plaintiffs' invention being substantially the same as Heilmann's; that is, an imitation with a colourable variation of form: when the action of the two machines is apprehended, the most cogent part of the evidence on this point is known. The jury saw them, and thought them substantially different; and we have also considered them, and do not think that the jury have come to a wrong conclusion.

Moreover, if the two inventions are tested by their results, the evidence for the plaintiffs shows that their process would do more work in the same time than Heilmann's in the ratio of 360 to 100; that the sliver produced by the plaintiffs was far superior, and the quantity of sliver from the same quantity of wool greater, and the cost of the production less. To this evidence of novelty should be added the remarkable price paid for the use of the plaintiffs' invention; which indicates a superiority, and therefore novelty. This evidence is, in our judgment, sufficient to sustain the verdict finding that the whole combination was an invention of a new improvement.

*1016] *Then, was there a misdirection in respect of this issue? The jury were told in the common form on this point that, if the combination, the subject of the patent, was new and useful, though each of the parts which entered into it were old, still the combination might be the subject of a valid patent. In this there was no misdirection. Then, was there any other question in respect of novelty which ought to have been submitted?

The main point, both at the trial and on the argument, was, in effect, a point of law, upon an undisputed fact, viz. that the specification for the plaintiffs' invention of 1850 included, in the combined mechanism, for the combined process, the nipping process included in the combination, the subject of Heilmann's patent in 1846. The plaintiffs had not adopted the same nipping mechanism; for Heilmann had used two bars moving vertically; the plaintiffs had a bar above falling vertically on an endless apron, and so nipping; and then both nippers moving horizontally, and so detaching; also the nipping process of the plaintiffs produced a more useful effect in their whole process than Heilmann's did in his. Still the substitution of nipping for lashing was an important part of the combination invented by Heilmann; and, as the plaintiffs took the nipping process, which was a subordinate combination included in and forming a new and material part of Heilmann's whole combination, and used it in their combination, patented in 1850, and also in the improvements thereon, patented in 1851 and 1852, it was clear that those patents of the plaintiffs could not be used without an infringement of Heilmann's patent; and this point was so ruled in the action of Heilmann v. Lister, in respect of the patent of 1851. It was proved,

*1017] on this trial, to apply to each of the other *patents; and the defendant now asserts that each of those patents is therefore void, contending, first, that a patent for a combination is, in effect, a

claim that each part of that combination is new; and, if any part claimed by a patent to be new is old, the whole patent is void.

The answer is that a patent for a combination is not a claim that each part thereof is new. On the contrary, each part may be old, and yet a new and useful combination of such old parts may be valid, as has been often decided. Even if the specification contained no disclaimer, it would be a question of construction whether the patent was void. Did it claim as new that which was old? If so, it would be void: but unless that was the true construction of the instrument the patent might be valid. But, where there is either a disclaimer or an acknowledgment that a part is old, all ground for this objection is gone; and here the plaintiffs, in 1850, expressly refer to Heilmann's invention, and, in 1856, expressly renounce any claim to the nipping invented by Heilmann.

The second argument was that, if a subsequent patent for a combination includes a part of an invention already protected by patent, it infringes on the property of another, and so is a violation of his right, and ought to be held illegal on account of his interest. The answer is that the patent for an improvement on an invention already the subject of a patent, if confined to the improvement, is not an infringement of the former patent. The use of the improvement with the former invention, during the existence of the former patent, without license, would be an infringement; but, with license, that also would be lawful, as is in constant experience. Indeed the objection was carried to the extent that a patent for *an improvement on a patent invention of the same patentee would be void; but this rests only on the assumption that the improvement cannot be distinguished from the invention on which it is made. The assertion, that all patents for improvements on existing patents must be void, is obviously untenable. [*1018

The third argument on this point, that a patent for an improvement on a patent was void as contrary to policy, because it prolonged the monopoly granted by the first till the last expired, is already virtually answered. The monopoly in the second patent is for the improvement only; and the use of the former invention without the improvement is free at the expiration of the first patent. The protection acquired by Heilmann, for the whole and each material part of the combination invented by him, operates from 1846. The protection of the plaintiffs, for the whole and each material part of the invention patented in 1850, dates from that time. The protection for the improved nippers and porter comb, exclusive of the former mechanism under the patent of 1851, dates from that time; and the improved nippers, and the transferring and working comb, without nippers, in 1852, exclusive of the invention in the two former patents, dates from that time. As to this objection, which applies equally to the patents of 1850 and 1852, we are of opinion that it fails, and consequently the exception to the summing up, that it did not on this objection rule the patent to be void, fails also.

With respect to the issue on the infringement of the patent of 1850: the evidence was that the defendant used Crabtree's machine, in which a tuft was detached by a comb lashing into feed carried in by porcupine rollers, and was cleaned, as to its tail half, by carding *surfaces. This part of the process was said to be substantially different [*1019 from the part of the plaintiffs' process relating to the first half of the

tuft, and so no evidence of infringement of that part of his combination. But with respect to the transferring the tuft, so half-cleaned, by a porter instrument, and placing it on a comb for carrying it out, in the manner above described, the evidence for the plaintiffs was strong to show that this material part of the process used by the defendant was identically the same with that specified by plaintiffs in 1850; and that the combination of mechanism, used by the defendant for performing this part of the process, was substantially the same as that described in the plaintiffs' specification in 1850; and that the difference between the porter-brush, used by the plaintiffs in 1850, and the porter-comb used by the defendant, although perhaps an improvement, was still a mechanical equivalent, performing the same part of the process comprised in the plaintiffs' patent, without any material difference in the manner of operation or in the result.

The evidence was also strong to show that this part of the plaintiffs' process was new at the time of his invention in 1850, and a material part of that process; and the jury were, in effect, told that, if they found this evidence to be true, they should find for the plaintiffs on this issue. The law was laid down that the plaintiffs' patent was for the whole combination for the whole process as specified; but that the defendant might be guilty of an infringement, without using that whole combination for that process. That the combination, taken as a whole, might comprise subordinate parts of that whole; and that, if the defendant had taken and used one of such subordinate parts, which was new *1020] and *material in the plaintiffs' process, such user might be an infringement, although the other subordinate parts comprised in the plaintiffs' patent were not taken or used by the defendant; and also that such user of one subordinate part, which was new and material, might be an infringement, whether the other subordinate parts forming the whole were new or old. And, in applying these principles to the infringement of the patent of 1850, it was stated that the patent was for the whole combination for the whole process, the effect of which, in cleaning both parts of the wool, was described at the close of the specification: that the process might be divided into two parts, the first for cleaning the first half of the tuft, as to which on this issue there was no question, and the second for cleaning the second half, which was here the important matter: that the mechanism for the second part was the transferring and placing the tuft by a porter instrument on the comb for carrying out, as above described. On the question whether this part of the process specified in the plaintiffs' specification was material for the purpose of the plaintiffs' process, there was no dispute: but on the question whether this part, by itself, was new, there was conflicting evidence which was left to the jury; and also on the question whether the defendant had used this part of the plaintiffs' combination. That is, Whether the defendant's combination of mechanism for this part of the process of combing was substantially the same as the plaintiffs', though it differed in form, was also left to the jury, who found for the plaintiffs on both points.

Objections have been raised to this part of the summing up in many shapes; the substance of all being, that the taking of a part is either no *1021] infringement of a *patent for a whole, or, if it is, the patent for the whole is void, unless every part is new. But all the points

made for the defendant here were made and overruled in the three cases which decide that a patent for a whole combination may be infringed by taking a part, provided it is new and a material part of the combination.

In *Sellers v. Dickinson*, 5 Exch. 312,† the circumstances are similar to those here in question. The patent was for improvements in looms for weaving. The specification was for an improved process for stopping power looms, when the shuttle stopped in the shed, by the combination of mechanism described in the specification. The process comprised two main operations, viz., the shifting of the driving strap from the fast to the loose pulley, and the bringing of the break to the fly-wheel. The arrangement for shifting the driving strap, by a clutch-box and other means, could be distinguished from the arrangement for moving the break to the fly-wheel; but the whole combination was specified without any claim or disclaimer as to any part. The clutch-box, for shifting the strap, was old; the defendant made a combination for the same purpose containing two arrangements: that for shifting the driving strap was by a frog instead of a clutch-box, and was not the same as the plaintiffs'; but that for applying the break to the fly-wheel was the same. The defendant contended that, if the plaintiffs' patent was for the whole, there was no infringement, and, if it was for each part, the clutch-box was old, and so the patent was void: but the Judge ruled that the patent was valid if the whole combination was new and useful, and that the defendant had infringed if he had taken *a new [*1022 and material part, that is, the arrangement for bringing up the break: the same questions were left to the jury as in the present case; and the jury found for the plaintiff: and that summing up was held to be right.

That case was founded on *Newton v. Grand Junction Railway*, 5 Exch. 331,† where the patent was for improvements in the construction of boxes for axles, and the specification claimed a combination by which boxes, cast with fillets, were lined, first with a coating of tin, and then of alloy, for the purpose of preventing the abrasion arising in ordinary boxes. The defendant lined boxes with tin, without using fillets or alloy; but the lining of tin was intended for and effected the purpose to which the plaintiff's patent related: the Judge ruled that the jury must take the whole of that for which the patent was granted, fillets lined with tin and then with alloy, and say whether that was new; that, if a patent was granted for a new combination of several things known before, this did not prevent any one from using what was old; and that it was for the jury to say whether the part here used by the defendant was substantially the same thing as the plaintiff's invention. This direction was held to be right. The Lord Chief Baron, in giving judgment, observed: "It was argued, that the same criterion is to be applied to the question of infringement as to that of novelty. But it is not so. In order to ascertain the novelty, you take the entire invention, and if, in all its parts combined together, it answer the purpose by the introduction of any new matter, by any new combination, or by a new application, it is a novelty entitled to a patent. But in considering the question of infringement, all that is to be looked at is, whether the defendant *has pirated a part of that to which the patent ap- [*1023 plies; and, if he has used that part for the purpose for which the patentee adapted his invention, and for which he has taken out his

patent, and the jury are of opinion that the difference is merely colourable, it is an infringement."

In *Smith v. London and North-Western Railway Company*, 2 E. & B. 69 (E. C. L. R. vol. 75), the patent was for an improved wheel; the specification was for a boss, arms and rim welded into one solid mass, in the manner therein described. The defendant imitated the manner of joining the boss into one mass or piece with the rest of the wheel, but had a different mode of joining the arms and rim. The Judge ruled that the patent was for the whole; but, if the defendant had imitated the mode of welding the nave or boss, and that was a material part of the invention, there was an infringement of part of a patent, which was actionable; and this Court held the ruling to be so indisputable that it refused a rule to show cause for misdirection.

We cite these cases at length, because the principle in all is the same as that laid down to the jury in the present case, and they establish that a valid patent for an entire combination for a process gives protection to each part thereof that is new and material for that process, without any express claim of particular parts, and notwithstanding that parts of the combination are old. The reasons assigned in these cases are strong to show that such an application of the law of patent is necessary to protect invention from piracy, and leads to no practical difficulty in trying whether a part alleged to be pirated is new and material.

*1024] *For these reasons we think that the objections to the summing up in respect of the infringement of the patent of 1850 fail.

With respect to the patent of 1852, there was an issue whether the specification was sufficient. There was also a dispute on the construction of it; and some evidence was given to guide the Judge in construing it, and to prove to the jury that it was not sufficient. The Judge held that the specification described a mechanism for a comb, to be applied in machines for combing, such as had been the subject of former patents to the plaintiffs, and that the model produced on the trial showed one application of the patent invention in question, although the transferring comb took the wool from screw gill combs, and not from carrying combs of longer teeth than screw gill combs, and drew the wool from the screw gill combs, and did not merely lift it from one carrying comb and transfer it to another. The evidence for the guidance of the Judge in construing it, and for the consideration of the jury on its sufficiency for a workman of ordinary skill, was nearly the same.

The witnesses for the defendant relied upon the diagram No. 5 compared with other diagrams, and thought that the comb marked A, from which the transferring comb was there represented to be taken, was not intended for a screw gill comb, and that the action of the transferring comb, according to that diagram, would merely lift and transfer, and that the diagram and specification did not show any machine or any application of the comb to a machine.

For the plaintiffs, it appeared that their patents of 1850, 1851, and 1852, were all in a series of improvements. The patent of 1850 recited *1025] the patent to *Donnisthorpe and Whitehead in 1849, of which a specification was in evidence, and that their new patent was an improvement thereon; and in describing the drawing annexed to the specification it is stated, "we have not thought it necessary to show a

complete machine for combing wool, as such is now well understood." Also it was apparent that there is no technical name for each comb used in the different parts of the process; but they are described according to their action. That which, in the model of 1850, was at the trial called the travelling comb, and in this judgment is called the carrying-out comb, is called, in page 3, a carrying comb, and, in page 5, a passing comb; and as to screw gill combs, it declares, in p. 6, that, although they are shown, as the teeth through which the fibrous material is to be previously conducted, the patent is not confined thereto, as the same may be varied without departing from the invention.

As the patent of 1850 improved on the patent of Donnisthorpe and Whitehead in 1849, so the patent of 1851 improved on that of 1850, by substituting nipping bars for the former nipping means, and a porter-comb for the porter-brush; in other respects the process and the apparatus being the same as in 1850.

Then, in 1852, followed the patent in question for further improvements in parts of the same apparatus, for the same process. It has three distinct claims for distinct inventions, either of which may be used alone, as convenience may require; but all respectively applicable to the plaintiffs' patent machines.

The first claim relates to an improvement on the nipping means: the under jaw has teeth, and rises into the feed, and draws out fibres before the upper nipper *descends, and, at times, transfers from the [*1026 screw gill combs, which carry in the feed, to the combs, which carry it out to be drawn off; and the specification states that the diagram, figure 3, shows a sectional view of parts of apparatus, which for the most part are similar to arrangements of machinery shown in the specifications of patents recently granted to Lister, that is, the patents of 1850 and 1851; and afterwards the former specification is again referred to as known. Next follows the second invention, of plungers to add length to the drawing of the nippers; on which nothing turns. Then follows the third invention, now in question. It is stated to relate to transferring wool from one carrying comb to another in the act of working the same. The diagram is referred to; and the process is described to be "for the transferring and working comb to rise up into the wool brought by the passing comb, and to draw out such wool, and to transfer it to, and place it on, the carrying-out comb, so that the ends which were inwards should be then outwards, for the purpose of being drawn off in the ordinary way." The model produced by the plaintiffs at the trial showed, in the opinion of some witnesses for the plaintiffs, that the transferring comb, oscillating as described, detached a tuft by lashing, cleaned the tail half in detaching, and placed it with the uncleared head on one side of the carrying-out comb, so that the drawing-off rollers drawing the clean tail would clean the head, and produce a good sliver; and there was evidence that the plaintiff had used this invention, while he was prevented from taking a tuft by nipping after the verdict for Heilmann; and there was evidence that a workman, knowing the machinery in use at the time the patent was granted, could apply the *invention without difficulty. The Judge held that the speci- [*1027 cation was not confined to a comb for lifting and transferring, without also drawing, or otherwise combing, but was applicable to such a machine for wool combing as that described in the plaintiffs' patents;

and that, as the transferring comb was to transfer from one carrying comb to another carrying comb, and as in plaintiffs' machine there were two carrying combs, that for carrying in feed and that for carrying it out, and as the patent transferring comb was to take from one carrying comb to another, and no others appeared, it might be applicable to transfer from the one of them to the other; and, if screw gill combs were used as carrying-in combs, it might be applicable to transfer from screw gill combs. The question of its applicability to screw gill combs was only relevant to the correctness of the plaintiff's model of his invention, and not directly to any issue in the cause. According to this construction, the invention consisted in a process, substituting, for detachment of a tuft by nippers and transference as in the invention of 1850 and 1851, a detachment and transference by a porter-comb, in the manner described in the specification, the rest of the combined process remaining the same as in the machines then in use. We consider this construction correct, and that the direction was correct in laying down that the workmen applying the invention must be taken to know the former specifications referred to in the specification of this patent for improvements.

With respect to the infringement of the patent of 1852, the question in the common form, Whether the defendant had imitated the substance of the plaintiffs' invention with a colourable variation, was the proper *1028] question for the jury; and, in applying the evidence to *this question, their attention was drawn to the plaintiffs' patent of 1850, and to the part of the process relating to cleaning the head of the tuft, as before discussed in respect of that patent. Then, with respect to the patent of 1852, the question was, Had the defendant imitated that invention by imitating the comb there described, and applying it to effect the same purpose in the process of combing as the plaintiffs' comb of 1852 effected in the mechanism comprised in the patents of 1850 and 1851? The comb of the defendant rotated on a cylinder, and in ascending lashed into the feed, brought by carrying-in combs, and detached a tuft, and, in descending, deposited it on a carrying-out comb in the manner above described.

The plaintiffs' comb, as described in 1852, performed precisely the same action, and with the same effect. As to the last half of the process, namely, that relating to the head of the tuft, the variation of form was that the plaintiffs' comb did by oscillation what the defendant's comb did by rotation, with two semi-axial turns: this was one point of variation for the jury; and the other point was as to cleaning the tail of the tuft. There was evidence that the plaintiffs' comb, drawing from screw gill combs, with a proper adjustment between the drawing and holding powers according to the wool, combed the tail half in drawing; the defendant's comb took the tuft from porcupine rollers, and cleaned the tail by passing it near to carding surfaces, as Preller had done. This was another point of variation. Bearing in mind these two points of variation, it was for the jury to consider the action of the two machines, connected with the object they were intended to effect; the plaintiffs' process and apparatus in 1850; the carrying in; *1029] the *nipping and detaching; the porter instrument; and the carrying-out comb receiving the accumulated tuft; then the improvements in 1851, and then the further improvements in 1852, whereby

(in No. 3) the porter instrument was made to lash, detach, and transfer, superseding the nipping means; and to compare the use of the comb described in the plaintiffs' specification of 1852 (No. 3) with defendant's process and apparatus, wherein the porter-comb was made to lash, detach, and transfer similarly to the plaintiffs' invention, and wherein the other actions on the wool to change it from uncombed lap to good sliver were the same as the plaintiffs', except that the tail of the tuft was cleaned by Preller's plan instead of Lister's.

This the jury had to consider in deciding whether the defendant had infringed by imitating the substance of the invention in 1852 (No. 3).

They found for the infringement; and we find no valid objection either to their finding or to the summing up.

Another ground for a new trial was the rejection of the office copy of the plaintiffs' specification in 1849, tendered by the defendant. The facts appear to be that, at the close of the defendant's evidence, several specifications were put in, under the notice according to the statute, and taken as read, to prove want of novelty; nine were received for this purpose; the tenth, offered at the same time for the same purpose, was the specification of the plaintiffs in 1849. To this objection was made, that no sufficient notice had been given to make it admissible. The defendant had given notice to admit a large number of specifications of other patentees; and, besides these, all specifications of the *plaintiffs. [*1030 On this, after a summons, a Judge made an order on defendant either to give the names and dates of the specifications of the plaintiff intended to be used, or that they should be excluded. The defendant then gave notice for all the plaintiffs' specifications between 1840 and 1850, and contended at the trial that this was a compliance with the Judge's order. The Judge ruled that it was not, on the ground that such an indefinite notice tended to embarrass the opposite party, and to deprive him of the means of preparation intended by the statute, it being admitted that the plaintiff had several other patents for various inventions in that interval.

After this it was suggested, by Mr. *Hindmarch*, that this specification of 1849 might be admissible to be read to the jury, as it might bear on the construction of one of the specifications now in issue. But, as it referred to a former patent to *Donnithorpe*, and not to this, and as no question had been raised upon the construction of any specification in issue to which this was shown to have the most remote relevancy, and as it had been tendered to disprove novelty, for which purpose it was inadmissible by statute, the Judge ruled that the proposal to read it to the jury, in order to assist in some unknown question of construction, was a mere pretence, in order to evade the consequence of disobeying the Judge's order, and rejected it. On this ruling we see no mistake of law; nor, after argument, have we any ground for thinking there was a mistake as to the facts on which the ruling proceeded.

We consider that we have now gone through all the grounds on which Mr. Attorney-General *Cockburn* *moved, and on which the rule [*1031 *Nisi* for a new trial was granted, and which are specified as grounds for this rule. Other points were mentioned in argument by some of the counsel for the defendant: but, as the rule was not granted on any of those points, we think we ought not to advert to them here.

For these reasons we are of opinion that the verdict was properly

found for the plaintiffs on all the issues, and that this rule for a new trial ought to be discharged. Rule discharged.

The defendant applied for leave to appeal, which was granted, but restricted to an appeal on the three following grounds.

"1. That it was erroneous to hold that the defendant's machine might be an infringement of the plaintiffs' patents of 1850 and 1852, or either of them, by reason of the use of a subordinate part only of the combination described in the specification, if the part so used was new and material, as stated in the judgment, although the other parts were old.

"2. That it was erroneous to hold that the patent of 1850 is for a combination as stated in the judgment.

"3. That it was erroneous to hold that the patent of 1852 is for a combination as stated in the judgment."

The case on which the appeal was brought was accompanied by the issue, the particulars and objections, copies of the specifications of the plaintiffs' patents, and of that of Heilmann, and a copy of the judgment of the Court of Queen's Bench, and stated that the appeal was restricted to the grounds above mentioned.

*1032] *The appeal was argued (a) by *Montague Chambers*, for the appellant, and Sir *F. Thesiger*, for the respondents.

Cur. adv. vult.

WILLIAMS, J., now delivered judgment.

This was an appeal from a judgment of the Court of Queen's Bench discharging a rule which had been obtained for setting aside a verdict for the plaintiff, and granting a new trial. No point was reserved at the trial; and the judgment of the Court discharging the rule was unanimous: there could not, therefore, be any appeal as of right; but the Court of Queen's Bench granted leave to the defendant to appeal on the following grounds: 1st. That it was erroneous to hold that the defendant's machine might be an infringement of the plaintiffs' patent of 1850 and 1852, or either of them, by reason of the use of a subordinate part only of the combination described in the specification, if the part so used was new and material as stated in the judgment, although the other parts were old. 2d. That it was erroneous to hold that the patent of 1850 is for a combination as stated in the judgment. 3d. That it was erroneous to hold that the patent of 1852 is for a combination as stated in the judgment. The evidence given at the trial is not before us: we have merely: 1. The issue; 2. The particulars of breaches and the objections; 3. The letters patent stated in the pleadings, and the specifications thereon, with the disclaimers. Also a copy *1033] *of the specification of Heilmann's patent, and a copy of the judgment. And the question is, whether we can reverse the judgment on any of the three grounds on which alone the defendant has been allowed to appeal. And we are of opinion that the judgment must be affirmed. The evidence is not before us (except as stated in the copy of the judgment below); and our inquiry is limited to the three points as to which leave has been given to appeal; and these are purely points of law. The first is more general: but the second and

(a) In Trinity Vacation, June 22d, 1857, before Pollock, C. B., Cresswell, Williams, and Willes, Js., and Bramwell and Watson, Bs.; and in Michaelmas Term (November 9th, 1857) before Pollock, C. B., Williams and Willes, Js., and Martin, Bramwell, and Watson, Bs.

third turn on the legal construction of the specifications of the patents respectively referred to. As to the first point, it was argued before us, on behalf of the appellants, that, if a patent be taken out for a combination of *a*, *b*, and *c*, it could not be infringed by using a combination of *b* and *c* only. We are of opinion that the answer to this inquiry turns altogether upon what *a*, *b*, and *c* are, how they contribute to the object of the invention, and what relation they bear to each other. Cases may possibly be suggested where the use of *b* and *c* might not be an infringement of the patent; but more easily cases may be put where the use of *b* and *c* would be an infringement of the patent. Whether in this case it was so or not would depend upon the facts of the case, and may be more a question of fact for the jury than of law for a Court of appeal. But the facts are not before us; and we think the Court below was right in deciding that the use of a subordinate part of the combination might be an infringement of the patent if the part so used was new (by which we understand new in itself, or in its effect, not merely in its application) and material. The second point is, whether it was erroneous *to hold that the patent of 1850 was for a combination. In deciding this point it may be proper to observe [*1034 that, to sustain the judgment of the Court below, it is not necessary to decide that the patent was for a combination only; it is sufficient if it was in part for a combination: it may have been for the combination of several things, and also for the novelty and utility of one of them. Now, in the specification of the patent of 1850, there is this passage: "The use of screw gills or series of teeth acting in like manner to bring up successive quantities of fibre when, as hereinbefore described, combined with the use of drawing out detached quantities of fibres therefrom, is a highly useful part of our invention." A combination is here expressly stated to be part of the invention; the judgment of the Court below must therefore, on this point, be affirmed. So the third point, whether the patent of 1852 was for a combination, seems to us decided by the description of a combined nipping and combing action in the very beginning of the specification, as it would stand after the disclaimer. It may be that a combination is not distinctly and expressly claimed in either of these patents. But neither a claim nor a disclaimer is essential to a specification; that which appears to be the invention, or a part of it, will be protected, though there be no claim; and those matters which manifestly form no part of the invention need not be disclaimed.

On these grounds we think the judgment of the Court of Queen's Bench must be affirmed. Judgment affirmed.

A patent may be granted for a combination to produce a new result, whether the elements thereof be old or new; nor will it be affected, where the novelty is claimed for the combination alone, though an old combination should enter into and form part of the invention: *Pennock v. Dialogue*, 4 Wash. C. C. 538; *Brick v. Hermance*, 1 Blatch.

C. C. 398; *Brooks v. Jenkins*, 3 McLean 432; *Root v. Ball*, 4 Id. 177; *Rheam v. Holliday*, 16 Penn. St. 347; 18 Id. 465; *Barrett v. Hall*, 1 Mason 447; *Howe v. Abbott*, 2 Story 190; *Washburn v. Gould*, 3 Story 122. So, on the other hand, a patent for a combination of known mechanical powers, means, or contrivances to produce a

particular result, will not be infringed, unless all the same powers, means, or contrivances, or their equivalents, be used in substantially the same combination to produce the same result: *Prout v. Ruggles*, 16 Peters 341; *Carver v. Hykes*, Id. 513; *McCormick v. Talcott*, 20 How. U. S. 406; *Stimpson v. Baltimore and Susquehanna Railroad*, 10 Id. 329; *Brooks v. Bicknell*, 4 McLean 70; *Bynam v. Eddy*, 24 Verm. 666.

Where, however, the elements, means, powers, or contrivances, or some of them, as well as the combination itself, are novel, this distinction is now established, both as to entirely original inventions and as to improvements: Where the patent includes several distinct machines or processes, each designed for an entirely separate and independent use, and is also for a combination of the same machines or processes to produce a connected result, the patent will be void if it extends to more than the mere combination—for the patent laws require separate inventions to be patented separately: But where the separate machines or processes are merely parts of one invention, connected in their design and

operation, and are distinctly described and claimed in the patent and specification, the patent will include not only the combination, but the separate parts, and the unauthorized use of any one of the latter will be an infringement: *Hogg v. Emerson*, 11 How. U. S. 587; *Evans v. Eaton*, 3 Wheat. 454; *Barrett v. Hall*, 1 Mason 447; *Moody v. Fiske*, 2 Id. 112; *Wyeth v. Stone*, 1 Story 273; *Root v. Peak*, 4 McLean 177; *Parker v. Haworth*, Id. 370; *Hoey v. Stevens*, 1 Wood. & Wm. 290.

There is no doubt in the United States as to the validity of patents for improvements on old machines; indeed the statute expressly includes them: see *Barrett v. Hall*, 1 Mason 470; *Whittemore v. Cutler*, 1 Gallison 478; *Potts v. Tremple*, 4 McLean 558: and it has been distinctly held that a patentee may obtain a patent for an improvement on his original invention, as any other inventor might. All that the law requires of him in such case is that he shall not claim as new what is covered by a former invention, whether made by himself or any other person: *O'Reilly v. Morse*, 15 How. U. S. 132.

*1035] *JANE BLAKEMORE, Administratrix of JAMES BLAKEMORE, deceased, v. The BRISTOL and EXETER Railway Company. Feb. 23.

A railway Company carried goods on their rail, at mileage-rates, stipulating that the owners should unload them at the station. The Company kept a crane at the station, the use of which they allowed gratuitously to such owners, using it themselves when they unloaded goods there.

While an owner of goods, carried at mileage-rates, was so using the crane, the crane, owing to its being in an unsafe condition, as the company knew, broke. In a declaration against the Company for mischief thereby occasioned, plaintiff alleged that the Company had, for the purpose of enabling the owner to deliver the goods, provided the crane, which was necessary, and that the Company professed to the public that the crane was placed at the station for the purpose, and it was intended by them to be used for the purpose. The defendants having traversed this allegation, held that the finding should be in the affirmative.

The Company, on the arrival of the goods at the station, gave notice to the consignee and required him to remove them: he applied to the clerk at the railway station for assistance, and obtained the aid of servants of the Company, and, with them and his own servants, proceeded to raise the goods with the crane. The plaintiff alleged in the declaration that the

Company requested the consignee to remove the goods by means of the crane. The defendants having traversed this allegation, held that the finding should be in the affirmative.

The consignee, while attempting to raise the goods by his own servants and those of the Company, requested B., who was the servant of neither, to assist, which B. was accordingly doing when the crane broke. The plaintiff alleged in the declaration that B. used the crane at the request of the Company. The defendants having traversed this declaration, held that the finding should be in the affirmative. And, further, that B. must be considered also as the servant of the consignee.

The action was brought, under stat. 9 & 10 Vict. c. 93, by the administratrix of B., who was killed by the accident. On a plea of Not guilty, held:

1. That defendants could not resist the action on the ground that it was for a tort arising out of the contract for carriage to which B. was not a party, inasmuch as there was in it no contract by defendants to supply the crane or any means of delivering the goods.
2. That defendants could not resist the action on the ground that they were merely gratuitous lenders for use, inasmuch as such a lender is, as between himself and the party to whom he lends, liable for mischief directly resulting from the unsafe condition of the article, if that be known to the lender.
3. But that the issue on this plea must be found for the defendants, because they had not lent the crane to B. at all, nor for the purpose of its being used by B.

THE declaration alleged that defendants were common carriers, by railway, of blocks of stone to Weston super Mare; and there had been delivered by certain persons to defendants, as such common carriers, and defendants had received, as such, a quantity of blocks of stone to be conveyed by defendants for reward to *Weston super Mare, and there delivered to one Samuel Harvey; and the said blocks of [*1036 stone had been accordingly so carried by defendants, and arrived and were in a truck at Weston super Mare, and in a railway station of defendants; and defendants then gave notice to Harvey that they were ready and willing to deliver to him the said blocks of stone, and gave notice to him to cause the same to be removed, and that he might and should cause the removal of the same from the said truck and station in the manner and by the means in that behalf, as hereinafter mentioned, provided by them. Averment: that, for the purpose of delivering such goods so carried as aforesaid at the said station to the consignee thereof, and of enabling such consignee or his servants to remove such goods from such trucks at the said station, the defendants had provided and were possessed of a machine, in and upon the said station, called a crane; and no other means were provided by defendants for the said purposes; and such machine was necessary for the said purposes; and defendants professed to the public that the said machine in the said station was placed and set by them for the said purposes, and was intended by them to be used by such said consignees or their servants for the purpose of enabling them so as aforesaid to remove such goods; and defendants requested Harvey to cause the said blocks of stone, so as aforesaid arrived and deliverable to him, to be removed from the said truck and station by means of the said machine. And thereupon the said James Blakemore and others, as servants of Harvey, and by his command, and at the request of defendants, and not knowing that the said machine was dangerous and unsafe for such purpose, with due and proper care and skill in that behalf, used the said *machine in [*1037 the ordinary manner for the said purpose of removing the said blocks of stone from the said truck and the said station. Averment: that the machine was, at the time of the said use of it by Blakemore and the said servants of Harvey, wholly unsafe and dangerous, and in an insecure and dangerous state, and insufficient for the said purpose;

and that defendants then, and from long before then, well knew, and had full means of knowing, that the same was dangerous and likely to break and fall down and injure persons when used in the ordinary manner for the said purpose: that it was their duty not to have so provided such machine in such state for the said purpose, but to have provided fit and secure means for the removal of such goods from such truck and station, and to have taken care that such machine was not unsafe and dangerous for the said purpose, and was kept in a proper and safe state for the said purpose. Breach: that, by reason of the aforesaid negligence and wrongful and improper conduct of the defendants, not taking care that the said machine was safe and sufficient for the said purpose, and of the dangerous, insecure, and unsafe state and condition of the said machine, the same, while being so used as aforesaid by Blakemore and the said other servants of Harvey in the ordinary manner, and with due and reasonable skill and care for the said purpose, broke and fell upon Blakemore and killed him. Averment: that the suit was for the benefit of his widow and children.(a)

Pleas. 1. Not guilty.

*1038] *2. That defendants had not provided the machine in the declaration mentioned in and upon the said station for the purposes in the declaration mentioned, or any of them, as alleged; nor was the said machine necessary for the said purposes; nor did defendants profess to the public that the said machine was placed and set by them in the said station for the said purposes; nor was the same intended to be used by the consignees of the said goods or their servants in the declaration mentioned for the purpose of enabling them to remove such goods as alleged.

3. That defendants did not request Harvey to cause the said blocks of stone to be removed from the truck and station by means of the said machine as alleged.

4. That Blakemore was not the servant of Harvey, and did not, by command of Harvey, or at the request of defendants, use the said machine for the purpose in the said declaration in that behalf mentioned as alleged.

5. That defendants did not know, nor had means of knowing, that the said machine was dangerous, and likely to break and fall down and injure persons when used in the ordinary manner for the purpose in the declaration in that behalf mentioned as alleged.

Issues thereon.

On the trial, before Coleridge, J., at the Bristol Summer Assizes, 1857, the following facts appeared, according to the statement of this Court in delivering judgment, post, p. 1046.

"The defendants are common carriers of goods by rail; and they have two rates by which they carry them, tonnage and mileage. In respect of delivery, they undertake different degrees of liability, according as the *goods are carried at one or the other of these rates; *1039] and, as to those carried at mileage-rates, they stipulate(b) that they must be loaded and unloaded by the owners or their agents, and that they, the Company, will not be responsible for any risk of stowage,

(a) Stat. 9 & 10 Vict. c. 93.

(b) By the 15th condition of their notice, which was similar to that printed in the report of *Simons v. The Great Western Railway Company*, 18 Com. B. 805, 813 (E. C. L. R. vol. 86).

loss or damage, however caused. At the Weston Station the defendants have a crane; trucks containing heavy goods are wheeled, so as to come under it; and the defendants, by their servants, use this crane in unloading such goods, when they undertake the unloading, and allow the use of it gratuitously to owners, or their agents, when, according to the condition above stated, the unloading is to be done by them. The chain of this crane, at the time to which the present action relates, was in an unsafe condition, to the knowledge of the defendants; and it was in consequence of this that the injury complained of occurred.

"Three pieces of stone, weighing altogether above six tons, came, on the first December, 1856, to the Weston Station, consigned to Samuel Harvey. On the same day he received a notice of this from the defendants, and that, unless removed by the 3d, they would be subject to a stated additional charge per diem, until taken away. He came for the purpose of removing them on the 2d, with two servants. They were too heavy to be lifted by hand; and no other means of lifting them were there but the crane. Finding that the truck had not been brought under it, he applied to the clerk of the goods department to have this done; and this was done by himself and his two servants, assisted by [*1040] two or three of the servants of the defendants; and the operation of raising the pieces from the truck was commenced. One of the pieces was so large that they attempted to saw it in two in the truck, but could not; and then they proceeded to raise it whole. They had lifted it between two and three feet, when they found assistance necessary. James Blakemore, who was not in the employ either of the defendants or Harvey, happened to be crossing the line and in sight: one of Harvey's men called to him to lend a hand. He came for the purpose: and, in steadying the block down, the chain gave way: the beam of the crane struck him on the head: and he died of the injury."

On this state of facts the learned Judge directed a nonsuit; but, by consent, gave leave to move to enter a verdict for 250*l*.

Phinn, in Michaelmas Term, 1857, obtained a rule *Nisi* to enter a verdict for the plaintiff, on the ground that, "on the facts proved at the trial, the Judge should have directed the jury that the plaintiff was entitled to recover."

In last Term,^(a)

Butt, *Kinglake*, Serjt., and *Collier*, showed cause.—As to the second plea. The evidence did not show either that defendants had provided the crane for the purposes alleged, or had professed to the public that it was placed at the station for such purposes, or that it was intended to be used by the consignees or their servants in the removal. When the defendants themselves removed the goods, it would certainly be a fair inference that they *did so by the means which they themselves [*1041] were bound to provide and had undertaken to provide. But the contrary was the case here: the removal was to be effected by the consignees or owners of the goods, according to the 15th condition. That being so, the mere fact that the crane was on the premises furnished no evidence for the plaintiff upon this issue. It may be admitted that, if a custom of trade had been shown, this might have been incorporated with the contract. But there was not, nor indeed is it easy to see how

(a) January 26th, 1858, before Lord Campbell, C. J., Coleridge and Wightman, Js.; and, on January 30th, before the same three Judges.

there could be, any custom of trade for providing a crane in this station. If there had been no crane on the premises, the defendants, under the present circumstances, would not have been liable to an action for the want of it. [WIGHTMAN, J.—Suppose the condition had contained the words expressly “for the purpose of unloading, the owners or their agents may use the crane which is on the premises of the defendants.”] The words suggested would have shown only a permission to use, not a liability to furnish, the crane: and this is all that can be collected from the facts. As to the third plea, no request to Harvey by the defendants was shown. And, as to the fourth plea, James Blakemore was not the servant of Harvey; nor was there any proof that the defendants requested James Blakemore to assist. The knowledge of the defendants, traversed by the fifth plea, is a question of evidence. The defendants are, at all events, entitled to succeed on the plea of Not guilty. This question may be considered as if the accident had not been fatal, and James Blakemore were suing the defendants for a tort. Now he would not have been entitled to maintain such action. The action would be ultimately founded upon a contract express or implied: and there was no such contract *1042] between the defendants and James Blakemore, who merely assisted the consignees. Nor, even if it could be assumed that James Blakemore was the servant of the defendants, would the action lie. A master is not liable to his servant for damage accruing from the act of another party employed by the master, unless there be personal negligence on the part of the master, nor if the servant have as complete knowledge as the master has of that which causes the mischief: *Priestly v. Fowler*, 3 M. & W. 1; † *Degg v. Midland Railway Company*, 1 H. & N. 773.† The last-mentioned case shows that the same principle applies to the case of a voluntary assistant. *Dynen v. Leach*, 26 L. J. N. S. Exch. 221, †(a) also bears upon this. [Lord CAMPBELL, C. J.—I do not think it is quite to the point.] Treating James Blakemore only as a party employed by Harvey, the wrong, if any there be, is done to Harvey, with whom alone the contract was made, if made at all: *Tollit v. Sherstone*, 5 M. & W. 283.† *Levy v. Langridge*, 4 M. & W. 337, †(b) is the case most relied upon in support of the claim of a party for damages caused by a violation of a duty apparently arising from the relation of two other parties to each other. But there the defendant, who was held liable for the injury done to the plaintiff by an unsound gun sold, with warranty, to the plaintiff’s father, knew, at the time of the sale, that the gun was to be used by the son, and knew also of the unsoundness of the gun. That case is commented upon in *Winterbottom v. Wright*, 10 M. & W. 109, † where it is said that the plaintiff in *Levy v. Langridge* was substantially the party contracting, *and that *1043] by the misrepresentation a distinct fraud was committed on the plaintiff. But in *Winterbottom v. Wright*, it was held that, for a tort where the duty violated was only created by contract, one not a party to the contract could not sue. And here no public duty, nor any duty arising from Act of Parliament, existed: nothing can be collected from the declaration but a private contract; and that contract was not between

(a) See note (b) to 3 H. & N. p. 259; † *Williams v. Clough*, 3 H. & N. 258; † *Griffiths v. Jidlow*, 3 H. & N. 648.†

(b) In Exch. Ch., affirming the judgment of the Court of Exchequer in *Langridge v. Levy*, 2 M. & W. 519.†

the plaintiff and the defendants. Indeed no contract to provide a crane at all appears, even with Harvey; nor is there anything like a warranty. Even supposing (what is not the fact) that as between the defendants and Harvey there was a contract to provide such a crane as would not injure the article for which it was used, there is none with his servants to provide a crane that should not injure them.

Phinn and Barstow, contra.—As to the issues on the second, third, and fourth pleas, the contract which the Company must be understood to make with owners or consignees unloading their own goods is that reasonable facilities will be afforded by the Company; and, when the crane stands in the station, there can be no question that it is provided by the Company for the purpose of the unloading, and that, in effect, the parties unloading, and those whom such parties employ, are requested by the Company to use the crane. Besides, by stat. 17 & 18 Vict. c. 31, s. 2, the Company were bound to afford such facilities. [COLERIDGE, J.—I do not see how the general statute can apply in a case where a special contract is made by the parties.] As to the *knowledge by the [*1044] defendants of the defective state of the crane, the evidence left no doubt. The main question appears to arise upon the issue on the plea of Not guilty. Now the case cannot be put lower than that of a loan of the crane by the Company. What then is the liability of a party so lending? No express decision upon this point has been found in the English law books. In Story's Commentaries on the Law of Bailments, sect. 275 (5th ed.), it is said: "Another case of implied obligation on the part of the lender, by the Roman law, is, that he is bound to give notice to the borrower of the defects of the thing loaned; and if he does not, and conceals them, and an injury occurs to the borrower thereby, the lender is responsible. The ground of this doctrine is, that when we lend we ought to confer a benefit, and not to do a mischief. *Adjuvari quippe nos, non decipi, beneficio oportet.*(a) One case put in the Roman law is, where a party lends vitiated or defective casks, and the wine or oil put into them by the borrower leaks out, or is spoiled thereby, from want of notice of the defect, the lender is answerable. *Qui sciens vasa vitiosa commodavit, si ibi infusum vinum, vel oleum corruptum effusumve, condemnandus eo nomine est.*(b) A more stringent case would be, where a vicious horse is lent to put into a chaise for a ride, or drive, with a concealment of his defects, and thereby the chaise is broken to pieces, and the borrower is injured in his limbs. How our law would deal with such cases, where there is no fraud in the concealment, does not appear to have been decided." Sir William Jones, however, says that our law and the Roman, on the head of loans for use, are perfectly coincident: Essay on *the Law of Bailments, p. 64 (4th ed., by Theobald). In the French Code Civil, art. 1891, [*1045] the law is thus declared: "Lorsque la chose prêtée a des défauts tels, qu'elle puisse causer du préjudice à celui que s'en sert, le prêteur est responsable, s'il connaissait les défauts et n'en a pas averti l'emprunteur." And the principles above drawn from the Civil Law are referred to by M. Troplong in his comment on this article: Droit Civil Expliqué, Du Prêt, Commentaire du titre X., Livre III., du Code Civil, p. 131. So Pothier, in his Traité du prêt à usage et du précaire, ch. III., no. 84,

(a) Dig. Lib. xiii. tit. vi. 17, § 3.

(b) Dig. Lib. xiii. tit. vi. 18, § 3.

tome IV., p. 41, ed. Dupin, 1835, says: "Une autre espèce d'obligation du prêteur envers l'emprunteur, c'est celle de lui donner avis des défauts de la chose qu'on lui demande à emprunter, lorsqu'il en a connaissance, et que ces défauts peuvent causer du dommage à l'emprunteur. Le prêteur, faute d'avoir satisfait à cette obligation, est tenu, *actione contrarii commodati*, de tout ce que l'emprunteur a souffert du vice de la chose prêtée, dont il n'a pas été averti." And he adds the instance, from the Civil Law, of the defective vessels, cited by Story. Langridge v. Levy, 4 M. & W. 337,† cannot be distinguished from this case if the knowledge that the crane was defective, and the intention that it should be used by the consignee and his servants, be kept in view. The plaintiff, who there succeeded, was not a party to the original contract of sale.

Cur. adv. vult.

COLERIDGE, J., now delivered the judgment of the Court.

*1046] This was a rule to set aside a nonsuit, and enter a *verdict for the plaintiff for an amount settled at the trial.

The action was brought by the plaintiff, on behalf of herself and children, as administratrix of her husband James Blakemore, for an injury sustained by him which occasioned his death. And it may be convenient to state the facts, before we examine the several issues raised by the pleadings. (His Lordship then stated the facts as detailed, ante, p. 1038.)

The declaration stated that the defendants were common carriers by railway of blocks of stone to Weston, and had received certain blocks to be carried there for reward, and there delivered to Harvey; and that the blocks had arrived; and that they had given Harvey notice that they were ready to deliver them to him, and gave him also notice to cause the same to be removed, and that he might and should cause them to be removed from the truck and station in the manner and by the means in that behalf as thereafter mentioned provided by them; and that, for the purpose of delivering such goods to the consignee, and enabling him or his servants to remove them from the truck, the defendants had provided and were possessed of a machine in and upon the station, called a crane; and no other means were provided by them for that purpose; and such machine was necessary for it; and that they professed to the public that it was placed by them for that purpose, and was intended by them to be used by such consignees or their servants for the purpose of enabling them to remove such goods; and that they requested Harvey to cause the said blocks to be removed by means of the said machine. And that thereupon James Blakemore and others, as *1047] servants of Harvey, by his command, and at *the request of the defendants*, and not knowing that the machine was dangerous for such purpose, with due care and skill used the machine in the ordinary manner for such purpose. That the defendants well knew that the same was dangerous and likely to break. That it was their duty not to have provided such machine in such state for such purpose, but to have provided fit and secure means for the removal of such goods, and to have taken care that the machine was kept in a proper and safe state for the purpose: it concluded with alleging the user and injury resulting.

The pleas were: 1st, Not guilty; 2d, a traverse that the defendants had provided the crane for the purposes alleged, or that it was necessary to be used for them, or that the defendants professed to the

public that it was placed there for the purposes alleged, or was intended to be used by the consignees or their servants to enable them to remove their goods; 3d, a traverse of the request to Harvey to cause the goods to be removed by means of the crane; 4th, a traverse that James Blakemore was Harvey's servant or acted by his command, or at the request of the defendants; 5th, a traverse that the defendants knew, or had the means of knowing, the dangerous state of the crane.

Now, upon reference to the statement of facts, it appears to us that there was abundant evidence on which the jury ought to have found for the plaintiff on the first traverse. It may be very true that a primary object for which the defendants had set up the crane was to enable them to remove the goods which should arrive, and whereof they had themselves undertaken the unloading and delivery: but it is obvious that another and perhaps equally strong motive was to facilitate the [*1048 removal of such heavy goods as the consignees were bound to unload and remove. It was manifestly of great importance to the defendants to have their trucks unloaded, and their station cleared of such goods, as speedily and conveniently as possible. By no other means in fact could they be removed: consignees could have no right to set up cranes on the defendants' ground for the purpose: and they had in fact always permitted such consignees to use their crane for the purpose, and, in the particular instance, had brought the truck to the crane that it might be so used. The rational conclusion surely is that it was provided for this at least among other purposes; that it was necessary for them; and that the defendants held out to the public that it was intended so to be used.

For the same reasons it is clear that the second traverse should be found for the plaintiff. The notice to Harvey to cause the removal imported a request or requirement that he would do so by the means provided, the only existing means, and the means the use of which they permitted.

The issue on the third traverse is to be found, on the same principles, for the plaintiff. It is clear that he came up to assist, in fact, at the request of one of the men employed by Harvey. This request being made in Harvey's presence, and the service rendered in Harvey's sight, he was therefore for the time in Harvey's employ. The request to Harvey to remove the stone by the means provided was a request for him to do so, using all such assistance as was necessary: and it is certain that no more than this was used. In this sense, Blakemore was requested to act by the defendants exactly as the other two men, neither more nor less. But then we think *this request is not material [*1049 in disposing of this issue, as it is clear the plaintiff was acting as the servant of Harvey.

As to the fourth traverse, there can be no question but that it must be found for the plaintiff.

The case for the defendants, therefore, must stand ultimately on the plea of Not guilty. And the argument for them was substantially rested on two grounds.

First, it was said that their liability was made to arise from the duty which grew out of the contract between them as carriers with Harvey as consignee of the goods; and, if so, it must fail, because it was an established rule that no one could sue for an injury resulting from a

breach of the duty, who was not privy to and could not have sued on the contract; for which, among others, the case of *Winterbottom v. Wright*, 10 M. & W. 109,[†] was cited. We certainly agree with the decision in that case, and should undoubtedly hold ourselves bound by it: but then, to make that principle apply, we must hold that the defendants were bound by contract as carriers, or otherwise, to provide Harvey with a crane or some equivalent means for the unloading of the stone from the truck. But of this we see no evidence. He chose to have his goods brought at mileage rates; and therefore he undertook the unloading. If the crane had been otherwise employed, and so the unloading of his goods had been delayed, it is clear he could have maintained no action for breach of contract. If it had been removed, and there were no crane there at all, the same consequence would have followed. As regards mileage goods, the crane was placed there in virtue of no contract with consignor or consignee, but just as any *other convenience erected and allowed to be used by the public in order to induce people to send their goods by the railway. A covered and convenient station is erected for passengers: but the purchase of a railway ticket would not entitle the passenger to an action if the station were uncovered or inconvenient: he may be considered as licensed to use it, so as to excuse a trespass; but he has no greater right. We think, therefore, this ground of defence fails in its first assumption.

But it was said, secondly, that, if no duty arose out of the contract between carrier and consignee, then the defendants stood in the situation of merely gratuitous lenders for use; and so, all fraud apart, were not responsible for any injury resulting from defects in the thing lent. And this appears to us to be the greatest difficulty which the plaintiff has to contend with. It is surprising how little in the way of decision in our Courts is to be found in our books upon the obligations which the mere lender of a chattel for use contracts towards the borrower. Pothier, in his *Traité du Prêt à Usage*, to be found in the 4th vol. of his works by Dupin, pt. 3, pp. 37 to 42, enters into the subject at some length: and Story also treats of it; Bailment, s. 275. The principles, which these two writers draw mainly from the Roman law, may be the more safely relied on as engrafted into the common law, considering that the whole of this branch of our law is so mainly built on the Roman, as the judgment in *Coggs v. Bernard*, 2 Ld. Raym. 909,^(a) demonstrates. It may, however, we think, be safely laid down that the duties of the borrower and *1051] lender are in some degree correlative. The lender must be taken to *lend for the purpose of a beneficial use by the borrower; the borrower therefore is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be qualified as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. *Adjuvari quippe nos, non decipi, beneficio oportet*, is the maxim which Story borrows from the Digest; and Pothier is express to the same effect, citing, as Story does also, the instance, *Qui sciens vasa vitiosa commodavit, si ibi infusum vinum, vel oleum corruptum effusumve*

(a) See notes in 1 Smith's Lea. Cas. 162 (4th ed.).

est, condemnandus eo nomine est. This is so consonant to reason and justice that it cannot but be part of our law. Would it not be monstrous to hold that, if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities, and conceal them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible? The principle laid down in *Coggs v. Bernard*, 2 Ld. Raym. 909, and followed out by Lord Kenyon and Buller, J., and by Lord Tenterden, in the *Nisi Prius* cases cited in the note, 1 Lea. Ca. (4th ed.), that a gratuitous agent or bailee may be responsible for gross negligence or great want of skill, gets rid of the objection that might be urged from want of consideration to the lender. By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from [*1052] him those defects known to the lender which may make the loan perilous or unprofitable to him.

If, then, the defendants could be considered as having lent the crane for use to James Blakemore, we should think the action well brought; for they would have lent it to raise heavy stone, knowing at the time that the chain was quite unfit to be used for such a purpose, and that it could not be so used without great danger of failing in the use, and great probability of injury to the person using it. Even if James Blakemore had been one of the men whom Harvey brought with him to remove the stone, and who were with him when he applied to have the truck brought under the crane, perhaps it might have been urged that the case fell within *Levy v. Langridge*, 4 M. & W. 387,† according to the limited construction given to it by Lord Abinger and Alderson, B., in *Winterbottom v. Wright*, 10 M. & W. 114, 115.† There it was represented to the defendant that the plaintiff's father wanted the gun for the use of himself *and his sons*, one of whom was the plaintiff. Lord Abinger says: "There the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and substantially the party contracting." And Alderson, B., says: "The principle of that case was simply this, that the father having bought the gun for the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it. There a distinct fraud was committed on the plaintiff." But, if in that case a friend of the father or sons, by their permission, had used the gun and sustained the accident, we apprehend, according to the reasoning used in both *the last-mentioned cases, no action could have been maintained by him. It has always been considered, that [*1053] *Levy v. Langridge* was a case not to be extended in its application. It may be urged that the defendants must be taken, from the circumstances, to have known that some one beyond Harvey must be employed in using the crane; and that may be so: but so also, in *Winterbottom v. Wright*, the defendant must have known that some coachman must drive the mail coach; and yet the plaintiff, happening to be that coachman on a particular occasion, could not sue for the damage sustained by the defective building of the coach. Moreover, although the defendants must be taken to have known that Harvey must have some assistance in working the crane, there is no ground for saying that they must have known that more would be necessary than the two men whom he brought with him, and whom he thought to be sufficient for the work. It is to be observed,

too, that there is another very material distinction between this case and *Levy v. Langridge*. There wilful deceit was charged; the defendant was found to have knowingly made a false warranty as to the gun: the judgment was founded expressly, in the Court of Exchequer, on the fraud and the damage directly resulting from it, and was expressly affirmed in error on the same ground. Here no fraud is charged; nor was any proved: a breach of duty is alleged in not providing a safe crane; and that duty, under the circumstances, could only arise from the contract in law between the lender and borrower; and to that contract James Blakemore was no ways privy.

*1054] *Upon the whole, therefore, we think we should be extending the law beyond any recognised principle, and in a way which might lead to very dangerous consequences, if we held that this action was maintainable. And therefore the rule will be discharged.

Rule discharged.

LE NEVE v. The Vestry of The Hamlet of MILE END OLD TOWN. Feb. 23.

Plaintiff occupied a house standing in a continuous line of houses, in a district within the provisions of the Metropolis Local Management Act (19 & 20 Vict. c. 120). Immediately in front of these houses was a paved public footway, fifteen feet wide, then a space thirty-three feet wide, then a public carriage-way fifty feet wide, then an intermediate space fifty-eight feet wide, then a paved public footway ten or twelve feet wide, immediately in front of another continuous line of houses facing the first-mentioned line. The intermediate spaces between the footways and the carriage-road had always been made use of by the owners of the houses opposite in such manner as suited their respective occupations: in some instances they had erected permanent structures; and plaintiff, whose house was a public-house, had, before the Act came into operation, placed in the part opposite to his house a permanent horse-trough; and the carts of his customers stood on that space while the drivers and horses were resting; he had also put there movable seats, and in summer a movable shed, and had fixed sockets which were let into the ground. The footway was always left clear. Plaintiff paid the owner of the soil for permission to use the intermediate space. The public passed over the intermediate space as of right, subject to the above-described user of it by the owners of the houses. Persons wishing to get from the footway to the carriage-road did so without objection, picking their way where the space was not obstructed. The vestry elected under the Act having removed the plaintiff's shed and seats as obstructions, within sect. 120: held that the section did not justify them:

1. Because the intermediate space was not part of a street within the meaning of the Act.
2. Because the shed and seats were not projections or obstructions against or in front of any house within the meaning of the Act.

THE declaration charged that defendants broke and entered certain land of plaintiff, being in front of a certain tavern or dwelling-house of the plaintiff, called The Earl Grey, situate in the Mile End Road, in the parish of Stepney, in Middlesex, and pulled down and destroyed a certain shed of the plaintiff, then erected there, and certain seats and forms then also fixed and being in and upon the said land, and the materials *1055] thereof carried away and converted and disposed thereof to their own use, whereby plaintiff not only lost the said sheds, &c. (damage).

Pleas. 1. Not guilty.

2. As to the breaking and entering, that the land was not plaintiff's.

3. Except as to so much of the declaration as charges defendants with

converting the materials therein mentioned to their own use, that, before and at the time of the committing of the acts herein pleaded to, the hamlet of Mile End Old Town was a district within the provisions of an Act of Parliament, &c. (18 & 19 Vict. c. 120, "For the better local management of the Metropolis"); and defendants were the vestry elected pursuant to the said Act, and duly empowered to act in the execution of the same for the district of the hamlet of Mile End Old Town. That plaintiff's land, in which, &c., was, at the time of the committing of the acts herein pleaded to, a street in the hamlet of Mile End Old Town, within the true intent and meaning, and subject to the provisions of the said Act: that the said shed, seats, and forms were an obstruction which had been placed in the said street in front of the plaintiff's house before the commencement of the said Act, and were an annoyance in consequence of the same projecting into and rendering less commodious the passage along the said street: wherefore defendants, pursuant to and by virtue of the powers vested in them under the said Act, gave due notice to plaintiff, being the occupier of the house in the front of which the said obstruction was, of their intention to cause the same to be removed, and, in accordance with such notice, entered upon the said land in which, &c., for the purpose of removing, and did then remove, the said shed, seats, and forms in and upon the *said land in which, &c., and did carry away the materials thereof to a convenient distance, and there left the same for the use of plaintiff, doing no unnecessary damage: which are the alleged trespasses in the introductory part of this plea mentioned.

Issue on all the pleas.

On the trial, before Wightman, J., at the Middlesex Sittings after last Trinity Term, the following facts appeared, according to the statement by the Court in the judgment, post, p. 1062.

"The question in this case is, whether the shed, seats, and forms, pulled down and taken away by the defendants, were obstructions placed or made against or in front of a house in a street, so as to be an annoyance, in consequence of the same projecting into, or being made in, or endangering or rendering less commodious, the passage along the street within the meaning of the 119th and 120th sections of stat. 18 & 19 Vict. c. 120.

"By the 119th section, 'if any porch, *shed*, projecting window, step, cellar door or window, or steps leading into any cellar or otherwise, lamp, lamp-post, lamp-iron, sign, sign-post, sign-iron, showboard, window-shutter, wall, gate, fence, or opening, or any other projection or obstruction placed or made against or in front of any house or building after the commencement of this Act, shall be an annoyance, in consequence of the same projecting into or being made in or endangering or rendering less commodious the passage along any street in their parish or district, the vestry may give notice to the owner or occupier to remove such projection or obstruction; and, if he does not, he is liable to a penalty for every day he continues it.

"By the 120th section, 'if any projection or *obstruction [*1057 which has been placed or made against or in front of any house or building in any such street, before the commencement of this Act, shall be an annoyance as aforesaid,' it shall be lawful for every vestry to cause the same to be removed or altered as they think fit, making

'reasonable compensation to every person who shall incur any loss or damage by such removal.'

"The Act came into operation on the 1st of January, 1856.(a)

"The plaintiff is the occupier of a public-house called The Earl Grey, in the Mile End Road, in which there is a continuous line of houses on both sides. Immediately in front of the houses is a paved footway, fifteen feet wide, then an intermediate space between the footway and the carriageway, thirty-three feet wide, and then the carriageway, which is fifty feet wide. On the opposite side of the way there is a paved footway immediately in front of the houses, ten or twelve feet wide, and then an intermediate space between that and the carriageway, fifty-eight feet wide.

"The occupants of the houses on either side have always made use of so much of the intermediate space as was opposite to their respective houses, in such manner as suited their respective trades or occupations. The house next to the plaintiff's was occupied by a coachmaker, who used so much of the intermediate space as was opposite to his house for placing carts and carriages upon it for repair. Beyond him was a stonemason, who used the intermediate space before his house for sawing *1058] pieces of stone which he placed there. The *plaintiff and his predecessors in the occupation of The Earl Grey had always a permanent horse-trough on the intermediate space; and the carts and wagons of customers stood upon that space, whilst the drivers and horses were resting. Before 1842, the occupier of The Earl Grey used to put seats and forms on the intermediate space for his customers, which were movable; and in summer had a sort of shed, which was covered at the top with an awning, and was open all round, and in which seats and forms were placed; and in 1842 sockets were put into the ground into which the supports of the shed in question could be put, and which shed was set up in summer; and in it were placed seats and benches; and in the winter it was removed: but at all times the paved footway was left perfectly clear. The lord of the manor was owner of the soil of the intermediate space; and the plaintiff, and the other persons using it, for the most part paid a small yearly rent to the lord for the use they made of it. In some instances, permanent structures were erected on the intermediate space; but in general that space was left open and unenclosed, except that in some places posts and rails were fixed, leaving openings, however, through which people could pass; and all persons who wished to get from the regular footpath into the carriage-road, or to cross to the opposite side, did so without objection, picking their way over such parts of the intermediate space as did not happen to be obstructed by the use made of it by the occupants of the respective houses. It was agreed at the trial that the public had at all times passed over the intermediate space as of right, subject to such use of it by the owners of the adjacent houses as has been described."

*1059] *Upon these facts, a verdict was found for the plaintiff, subject to leave to move as after mentioned.

Edwin James, in last Michaelmas Term, obtained a rule calling on the plaintiff to show cause why a verdict should not be entered for the defendants on the third plea, "on the ground that the defendants were

justified in removing the erection of the plaintiff under the provisions of The Metropolis Local Management Act, 18th & 19th Victoria, chapter 120, and local Acts."(a)

In the same term,(b)

Sir *F. Theiger* and *H. Hawkins* showed cause.—The place in question formed no part of a street; and therefore sects. 119, 120, of stat. 18 & 19 Vict. c. 120, are inapplicable. The owner of the soil had not dedicated it to the public. It is true that the public passed over it, as of right: but this right of passage was subject to such use of it by the plaintiff as he has in fact made by the erection of what the defendants claim to remove, and to similar uses by others. There cannot be a partial dedication; if the dedication be not absolute, there is no dedication at all; the mere putting up of a bar, though it is knocked down and not replaced, is sufficient to negative the dedication; though a limited right, as of a footway, may be granted: *Roberts v. Karr*,(c) *Lethbridge v. Winter*,(c) *Poole v. Huskinson*, 11 M. & W. 827.† [Lord *CAMPBELL, C. J.—Do you say that here the owner of the land [*1060 might have used it simply as private property?] That might be contended: but, for the purpose of this case, it is not necessary to go so far. [Lord CAMPBELL, C. J.—Certainly there cannot be a dedication to a part of the public.] Even if there can be a partial dedication, the public right cannot extend beyond the partial right granted: *The Marquis of Stafford v. Coyney*, 7 B. & C. 257 (E. C. L. R. vol. 14). [Lord CAMPBELL, C. J.—You find there that, according to the inclination of opinion both of Mr. Justice Bayley and of that most profound lawyer Mr. Justice Holroyd, there may be a partial dedication. COLERIDGE, J., referred to *Rex v. Leake*, 5 B. & Ad. 469 (E. C. L. R. vol. 27).] The habitual user cannot, of itself, destroy the exclusive right of the owner. In *Blundell v. Catterall*, 5 B. & Ald. 268, 315 (E. C. L. R. vol. 7), Abbott, C. J., said: "Many of those persons who reside in the vicinity of wastes and commons, walk or ride on horseback, in all directions, over them, for their health and recreation; and sometimes, even in carriages, deviate from the public paths into those parts which may be so traversed with safety. In the neighbourhood of some frequented watering places, this practice prevails to a very great degree; yet no one ever thought that any right existed in favour of this enjoyment, or that any justification could be pleaded to an action at the suit of the owner of the soil." The plea can be supported only by showing an obstruction of some part of the land over which the public had a right to go. [COLERIDGE, J.—The 119th and 120th sections would not be satisfied by showing a mere public highway and obstruction.] They would not: there must be a street. But a place thus used can form no part of a *street. Nor was there in this case any obstruction [*1061 "placed or made against or in front of any house or building." The erections here were separated from the houses by the full breadth of the footpath. Besides, to bring the case within sect. 120, compensation should have been made. [COLERIDGE, J.—It should seem that the compensation must be subsequent to the removal.]

(a) Stat. 18 & 19 Vict. c. 120, in sect. 90 and elsewhere, refers to local Acts: but none were mentioned in the discussion of the present case.

(b) November 19th, 1857. Before Lord Campbell, C. J., Coleridge and Wightman, Js.

(c) Note (a) to *Rex v. Lloyd*, 1 Campb. 262.

Collier and Welsby, *contra*.—No notice has been taken, in the argument on the other side, of the interpretation clause, sect. 250, which enacts that “the word ‘street’ shall apply to and include any highway (except the carriageway of any turnpike road), and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage.” Therefore the facts of this case bring the place within the definition, since it appears that there is a right of passage, a highway, over it, though hitherto subjected to a special user by the owners of the houses. It is said that no dedication was shown: but, if the intention was only to give a license, some act of obstruction ought to have been done: *The Trustees of British Museum v. Finnis*, 5 Car. & P. 460 (E. C. L. R. vol. 24). According to the view taken on the other side, the owner might now erect a row of houses on the space between the footpath and the carriage-road. [Lord CAMPBELL, C. J.—Your argument is that, if there be a public right of way all across, there is a street all across.] That is reasonable, and manifestly the meaning of the Act. The fair result of the evidence *1062] seems to be that the owner *dedicated the right of way to the public, reserving to himself the right to license the erection of sheds, &c. If so, there is a street; and, if there be a street, there is a right in the vestry to remove such obstructions as existed before the passing of the Act. It is argued that these obstructions are not against or in front of the houses: but they clearly are in front of them. [WIGHTMAN, J.—Would that be so, if they were at a distance of fifty yards?] Why not? [COLERIDGE, J.—Suppose there were no houses on the other side.] Still the erections would be in front of the one row of houses; and, if in fact they obstructed the passage along the street, might be removed, however wide the street. The suggestion as to the necessity of compensation before the removal cannot be supported: the compensation is to be for “loss or damage by such removal.”(a)

Cur. adv. vult.

WIGHTMAN, J., now delivered the judgment of the Court.

After stating the facts as *antè*, p. 1056, his Lordship proceeded as follows.

Under these circumstances, we are of opinion that the shed, seats, and forms in question were not such an obstruction in a street as might be removed by the defendants under the 120th section of the Act.

If the obstruction had been upon the regular paved footway of fifteen feet width, over which the public had an unqualified right of passage, the defendants might have been warranted in removing it under the *1063] 120th *section of the Act. But over the place in question the public have not an unlimited right of passage, but only a qualified right of little or no practical utility, and subject to such use as the occupants of the adjoining houses had been accustomed to make of it. The public, as of right, have only used such parts of the intermediate space as were not at the time occupied by the tenants of the houses: and, if this user could be considered as evidence of a dedication, it could only be of a partial dedication to the public: and a place, so partially

(a) See *Lister v. Lobley*, 7 A. & E. 124 (E. C. L. R. vol. 34); *Patteson, J.*, in *Doe dem. Gardner v. Kennard*, 12 Q. B. 244, 252 (E. C. L. R. vol. 64); *Paddock v. Forrester*, 3 M. & G. 903, 926 (E. C. L. R. vol. 42).

and occasionally used for passage by the public, is not, we think, part of a street within the meaning of the Act of Parliament.

Neither, in our opinion, is the obstruction such as is contemplated by the 119th and 120th sections of the Act, which seem to apply to projections or structures immediately against or in front of the house, such as are mentioned in the 119th section, and not to a movable shed set up on the other side of a paved footway of fifteen feet width, and which cannot be an annoyance to that footway by projecting into it or endangering or rendering less commodious the passage along the street properly so called. The dedication to the public of the use of the intermediate space was subject to the rights of the lord and his tenant; and the exercise of such a right as that claimed by the defendants would at once practically prevent any useful exercise of the right of property by the lord or his tenants, and that for no really useful purpose, as the passing over the land in question by the public was never used, or could be used, except for short and occasional deviations, or for passing from the footway into the carriageway whenever there happened to be a space in the intermediate ground, sufficient *for passing, left unen- [*1064 cumbered by the occupiers of the houses. This is an entirely different case from that of a strip of land left on each side of a carriage-road, and along which the public have passed as freely as along the main gravelled road. In the present case, the owners of the houses by the side of the paved footway have always, by the lord's permission, used the space between the foot and carriage way for purposes connected with their occupations, whenever they have had occasion; and such use as the public have had of it, which is of a limited and uncertain kind, was only subject to the use made of it by such occupiers.

We ought to say that we by no means sanction what was contended for in argument by the counsel for the defendants, that the intermediate space between the paved footpath and the carriage-road is to be considered private property without any public easement, and may be enclosed and converted to any purpose at the pleasure of the lord of the manor.

But, on the grounds we have stated, we are of opinion that the rule should be discharged.

Rule discharged.

*WILLIAM BONNALLIE GORDON, one of the Registered Officers of The CUMBERLAND Union Banking Company, [*1065
v. SARAH RAE. Feb. 23.

Defendant executed a bond for 2000*l.* to a banking Company; the condition whereof recited that C. kept an account with the Company; and it was declared that, if C. or defendant, or either of them, should on demand pay to the Company all sums, not exceeding in the whole 1000*l.*, which should from time to time be due to the Company by C., with interest, the bond should be void.

The Company sued defendant on the bond, alleging, as a breach, that on 30th June, 1856, there was due from C., as the balance of his account, 99*l.* 12*s.* 11*d.*; which had not been paid by C. or defendant, though duly demanded, and a further sum for interest.

Equitable plea: That the bond was executed by defendant solely as surety for C., and so accepted by the Company: and that, by reason of various verbal and written communications between defendant and the Company, before and at the time of execution, the liability of defendant, and the advances to C., which were to be secured, were limited to 950*l.*; and

defendant was to be informed if the account, with interest, should reach 1000*l.* and not be reduced within a month; and defendant became surety on such terms only: but the Company, on each of several occasions, made advances beyond 950*l.*; and on each of several occasions the account against C. exceeded 1000*l.* and was not reduced within a month, and defendant was not informed; whereby defendant became absolutely released from liability and entitled to equitable relief.

The Company took issue on the plea, and also replied over; and defendant took issue on the replication. On a special case, giving the Court power to draw inferences of fact, it was stated that, previously to the execution of the bond, the defendant objected, by letter, to becoming liable for interest upon an advance of 1000*l.*, and requested to know whether the 1000*l.* was to include interest. In answer, the Company informed defendant that the bond was for 1000*l.* with interest, but that there was little chance of its exceeding that sum for any length of time, as the Company, if it should be over the amount, including interest, at the half-yearly balance, would require it to be reduced to 1000*l.*, or would limit the amount to 950*l.*, which would leave a margin for interest. Afterwards, the Company executed a memorandum, to the effect that C.'s advance should be limited to 950*l.*, and defendant be informed if the account, with interest, should reach 1000*l.*, and not be reduced in a month. At this time the advance exceeded 950*l.* Defendant then executed the bond. Afterwards, the limit of 950*l.* was on many occasions exceeded. Also, on three occasions, the amount of 1000*l.*, interest included, was slightly exceeded, and not reduced within a month, and defendant was not informed of it. Also, at one half-yearly balance, the amount was 1004*l.* 10*s.* 1*d.*, but was reduced by 12*l.* in two days after.

Held, that the effect of the agreement was, not that the defendant should be discharged from liability upon the limit being exceeded, but that 950*l.* should be considered as substituted for 1000*l.* in the condition.

THIS action was brought by plaintiff, as the public officer and on behalf of The Cumberland Union Banking Company; and by it he sought to recover the sum of 996*l.* 12*s.* 11*d.*, being the amount claimed to be due from the defendant to the Company upon the bond referred to in the declaration.

*1066] *It was agreed by counsel, on the suggestion of Crompton, J., that the pleadings, which were long, should be shortened, but that the parties should be at liberty to give in evidence the matters contained in the pleadings as they originally stood. The shorter pleadings were to the following effect.

The declaration was on a bond, made 2d August, 1848, whereby Robert Cocks and defendant acknowledged themselves bound to two persons named, their executors, &c., in 2000*l.*, for payment of which defendant bound herself severally, subject to a condition: Whereby, after reciting (as the fact was) that Cocks had opened and then kept, and proposed to continue to keep, an account with the said Cumberland Union Banking Company (being a banking Company or copartnership established under stat. 7 G. 4, c. 46), and also reciting that it had been arranged and agreed that, for the security of the Company, Cocks, together with defendant as his surety, should enter into and execute to the two obligees (who were the then trustees of the Company) the said bond to be conditioned as therein and hereinafter is expressed: the condition of the said bond was and is declared to be: That, if Cocks and defendant, or either of them, or either of their heirs, executors, or administrators, did and should, on demand to be made for such purpose by the manager for the time being of the Company in writing, &c., well and truly pay or cause to be paid to the obligees, or the survivor of them, or the executors or administrators of such survivor, their or his assigns, in trust for the Company, or otherwise to the said Company, at, &c., all and every such sums and sum of money (not exceeding in the whole the sum of 1000*l.* sterling) as should from time to time be and

remain due or owing *to the Company by Cocks, his executors or administrators, either alone, or jointly or together with any other person or persons whomsoever, &c., on the balance of the account between Cocks and the Company, for or in respect of any moneys, cash, bill or bills of exchange, promissory note or notes, note or notes of hand, draft or drafts, check or checks, or other securities or engagements whatsoever, at any time or times theretofore lent, advanced, paid or discharged, or accepted, discounted or taken up, or which, at any time or times, and from time to time, thereafter, should or might be lent, &c.; and did and should, at the same time, pay or cause to be paid to the obligees, or the survivor, &c., or the executors, &c., in trust for the banking Company, or otherwise to the Company, at, &c., all such lawful charges or allowances for interest, postage, stamps, commission, discount, and otherwise, as were usually charged by bankers to their customers, and did and should make such respective payments as aforesaid without any deduction or abatement whatsoever; then, from and immediately after such respective payments should have been so made as aforesaid, the said bond should be void, or otherwise should remain in full force and virtue. Averment: that the bond was made and delivered to the obligees, as such trustees as aforesaid, in trust for and on behalf and for the benefit of the Company, and not otherwise. That, after the making of the bond, Cocks continued to keep his account with the said Company; and that, while he so continued to keep the said account, and before the commencement of this suit, that is to say on 30th June, 1856, a large sum of money, not exceeding in the whole the sum of 1000*l.*, to wit, 996*l.* 12*s.* 11*d.*, had become and then was due and owing to the Company by Cocks, *on the balance of the said account between him and the Company, for and in respect of certain moneys, cash, bills of exchange, promissory notes of hand, drafts, checks, and other securities and engagements, before then respectively lent, &c., by the Company to, and for and on behalf, and on the account and for the use of, Cocks. And that, although the sum was afterwards, and before the commencement of this suit, duly demanded of defendant, the same had not been paid by defendant or Cocks, or any other person, to the obligees or Company, &c. But, on the contrary, the same sum, together with a further sum, to wit, of 500*l.*, for interest and commission upon and in respect of the said first-mentioned sum of, to wit, 996*l.* 12*s.* 11*d.*, such interest and commission being a charge usually made by bankers on their customers, remains still wholly due and unpaid; by reason whereof the said bond has become forfeited.

Plea 4, for a defence on equitable grounds. That the bond was executed by defendant, and the execution accepted by the Bank from her, solely as a surety for Cocks: And that, by reason of various verbal and written communications by and between defendant and the Bank, and the manager and agents of the Bank, and representing also and binding the obligees of the bond, and made before and at the time of executing the bond, and (amongst such) by a memorandum dated 2d August, 1848, signed by the then manager of the Bank, the effect and operation of the bond and condition, and the liability of defendant thereunder, were to be, and were, limited and controlled, and the advances by the Bank to Cocks, secured by the bond, were to be limited to 950*l.*; and defendant was to be informed if the account, with interest, should reach 1000*l.* and

*1069] not be reduced within *a month; and defendant only became surety upon and subject to such terms so limiting and controlling the bond and condition, and on the faith of the same being observed. That, in violation of such terms, and without defendant's assent, the Bank, on each of several occasions, made advances beyond 950*l.*; and that, on each of several occasions, the account of the Bank against Cocks, with interest, reached and exceeded 1000*l.* and was, on each of such occasions, not reduced to that sum, or at all, within a month; and defendant was not informed on such occasions, or any thereof, or within such time as defendant ought to have been informed, of the account, with interest, having reached 1000*l.*, and not having been reduced within a month, and was not informed of the account having reached such amount: and thereby defendant, before the alleged breaches of condition by plaintiff relied on in this action, was discharged from further liability on the bond and suretyship, and from liability in respect of the said alleged breaches, and has become absolutely entitled to relief in equity against this action.

The plaintiff took issue upon the 4th plea.

And, for a second replication to the said 4th plea, upon equitable grounds, the plaintiff says that, by reason of certain other matters and things, which are not mentioned in the 4th plea, the defendant, at the commencement of this suit, was liable upon the said bond as in the declaration alleged, and was not then discharged from liability in respect thereof, or entitled to absolute and unconditional relief in equity against this action.

On the trial, before Lord Campbell, C. J., at the Middlesex Sittings after Trinity Term last, a verdict was found for the plaintiff, by consent, *1070] subject to the *opinion of the Court upon a case, which, so far as regards the points here decided upon, was as follows.

The Cumberland Banking Company were established under the provisions of stat. 7 G. 4, c. 46, and carry on business as bankers at Workington, Maryport, Cockermouth, and other places in the county of Cumberland. The defendant is the widow of George Rae, who died in 1847.

In December, 1837, one Robert Cock (or Cocks, as he is called in many of the documents connected with this cause), a miller, residing at Furnace Mill, near Maryport, opened an account current with the said Company at their branch bank at Maryport. In the year 1845, Cock, having become considerably indebted to the Company on his said account, and security having been given for him to the Company by certain sureties, it was arranged that he and the said George Rae, as his surety, should, in lieu of the existing security, execute a joint and several bond to the then trustees of the Bank for the purpose of securing to them any balance which then was or might thereafter become due from Cock on his said account, together with interest, commission, and other usual charges, not exceeding in the whole the sum of 1000*l.* And accordingly such a bond was executed and delivered to the Company on or about the 4th April, 1845.

In November, 1847, George Rae died: and, by his will, which was duly proved by defendant, he appointed her his sole executrix, and left her the bulk of his property, which was amply sufficient to satisfy any claims which the Company might have made against him or her as his

personal representative under the said bond. At the time of Rae's death Cock was indebted to the Bank on his said account to the amount of 1200*l*.

*Defendant was, shortly after her husband's death, informed by the Bank that the balance due from Cock to the Bank was [*1071 somewhat above 1000*l*.; and Cock was requested by the Bank to reduce the debt owing to them to 1000*l*., and to procure a new surety in the place of Rae. After the death of Rae, and before the execution by defendant of the bond and memorandum hereinafter mentioned, payments were made by Cock to the Bank to the amount of 440*l*. Thereupon it was arranged that the defendant should become Cock's surety, and for this purpose should join with Cock in executing a new bond to the Bank, and that, upon delivery of this new bond to the Bank, the old one should be cancelled. Defendant, at the same time, stipulated with Cock that he should execute to her the mortgage hereinafter mentioned: but to this stipulation the Bank were not party, although they were aware that defendant had insisted upon some counter security from Cock.

At this time Charles Brown was the general manager of the Bank at Workington; and Ostell was the agent at the branch bank at Maryport.

After some delay, on 19th of June, 1848, the mortgage deed was executed by Cock, and was to the following effect.

It purports to be made between Robert Cock of the first part, Sarah Cock his mother of the second part, and defendant of the third part. It contains recitals that parts of the property comprised in the deed were already in mortgage to one White for securing 1000*l*. and interest; to one Fisher for securing 600*l*. and interest; and to Rae for securing 1230*l*. and 200*l*.: and the deed recited that all the above-mentioned sums and some interest were still owing. The deed then contains the *following recital. "And whereas, by a bond dated the [*1072

day of last, the said Robert Cock and the said Sarah Rae, as his surety, became jointly and severally bound to" the obligees mentioned in the declaration, "the trustees of The Cumberland Union Banking Company, at Workington aforesaid, in the penal sum of 2000*l*., subject to a condition for making void the same bond on payment by the said Robert Cock and Sarah Rae, or one of them, or their or one of their heirs, executors, or administrators, to the said" obligees, "their executors, administrators, or assigns, of the sum of 1000*l*., with interest, on the day of next." The deed then contains the following recital. "And whereas, for the purpose of better securing to the said Sarah Rae the payment of the said mortgage debts or sums of 1230*l*. and 200*l*. and the interest thereof, and the saving harmless and indemnifying her from the payment of the said bond debt of 1000*l*., to the payment whereof she is so liable as such surety as aforesaid, the said Robert Cock has agreed to convey and confirm the several freehold and customary hereditaments hereinafter described to her, the said Sarah Rae, upon such trusts for sale and in such manner as hereinafter expressed." The deed then purports to convey the lands therein mentioned to the defendant, subject to certain rents and services, and also subject, as to the property then already in mortgage, to White and Fisher respectively to the payments to them of the said respective sums of 1000*l*. and 600*l*. and interest. The deed then contains the following proviso and declaration. "Provided always, and it is hereby agreed and declared, that the

said several freehold and customary premises hereinbefore described, *1073] and their appurtenances, are hereby conveyed *to the said Sarah Rae, her heirs and assigns, as aforesaid, by way of mortgage for better securing to her the said Sarah Rae, her executors, administrators, and assigns, the payment of the said mortgage debts of 1230*l.* and 200*l.*, with the interest for the same, such interest to be computed from the date of these presents at the rate of 4*l.* 5*s.* per cent. per annum, and for saving harmless and indemnifying the said Sarah Rae, her heirs, executors, and administrators, from and against the payment of the said bond debt or sum of 1000*l.*, and all interest for the same, and all losses, costs, and expenses she or they may incur or become liable to by reason of the said bond." And the deed contained a power of sale, and of applying the proceeds of sale in paying the said mortgage debts and interest, and the alleged bond debt or sum of 1000*l.*, and all losses, costs, and expenses, and whether or not the said moneys should have been demanded and become actually payable, according to the condition of the said bond, or not. And it was thereby also declared that, for the purpose of better securing payment of the said principal and interest intended to be thereby secured, the said Robert Cock, being in actual possession of parts of the said premises, agreed and declared that he would, during the continuance of that security, hold the same premises as the yearly tenant of the defendant at the yearly rent of 250*l.*; and that it should be lawful for the defendant to use such remedies, by distress and sale, for recovery of the said rent when in arrear, as landlords may for the recovery of rents upon common law demises.

At the time of the execution of this deed no bond had been executed to or on behalf of the Bank by Cock and the defendant, as therein *1074] recited: and no bond *other than that mentioned in the declaration was ever executed by the defendant to or on behalf of the Bank.

After the execution by Cock of this deed, a bond was prepared on behalf of the Bank in the form usually adopted by them, and sent to the defendant for her execution. Upon the receipt of this bond the defendant returned it, on 28th July, 1848, to Mr. Brown, with a letter of which the following is a copy.

" Maryport, July 28, 1848.

" Dear Sir,

" I have received the bond: but, as I read it, I am to be chargeable, in the first instance, for all moneys advanced to Mr. Cock to the extent of 1000*l.*, and, in the second, for all such lawful charges or allowances for interest, postage, stamps, commission, discount, and otherwise, as are usually charged by bankers to their customers, and that I am to make such respective payments without any deduction or abatement whatsoever. The latter may, in time, amount to 1000*l.* more. I shall thank you to inform me whether I am right in my construction of the bond, or whether it is for 1000*l.* only, which said sum of 1000*l.* includes all the items enumerated. I should not like to be security for more than 1000*l.* to secure everything.

" Yours, &c.,

" SARAH RAE."

To this letter Mr. Brown replied as follows.

"Cumberland Union Bank, Workington, 31st July, 1848.

"Madam,

"The bond is drawn in our usual form, and is for 1000*l.* and interest, &c., thereon, as you understand it: but there is little chance of its exceeding that sum for any length of time; as, if it should be over the amount, *including interest, &c., at our half-yearly balance, we should require it to be immediately reduced to 1000*l.*; or we [*1075 can limit the amount to 950*l.*, which would leave a sufficient margin for interest, &c., for the half year.

"I am, Madam, yours obdtly.,

"C. BROWN."

After the receipt of this letter, defendant went to the Bank and saw Mr. Brown. She refused to execute the bond in the form proposed, upon the ground that it would make her answerable for more than she would agree to. Mr. Brown then proposed that the memorandum hereinafter mentioned should be made. He prepared and signed the memorandum in duplicate; one copy he gave to the defendant; and the other he pinned to the bond: and, at the same time, and in the presence of the defendant, requested a clerk to make a minute of it in the books of the Bank. Upon this the bond was executed by the defendant. No minute of the memorandum was ever made in any book of the Bank. Cock executed the bond: but, whether before or after defendant executed it, did not appear.

After the execution of the bond by defendant, the former bond by her deceased husband was given up to her.

The following is a copy of the memorandum:

"Robert Cock's advance to be limited to 950*l.*; and Mrs. Rae to be informed if the account with interest shall reach 1000*l.*, and not be reduced within a month."

"C. BROWN, 2d August, 1848."

It is a general custom with country bankers in the North of England to balance their customers' accounts half-yearly, on the 30th June and 31st December, allowing *interest on creditors' accounts at the [*1076 current rate of 3*l.*, 2*l.* 10*s.*, or 2*l.* per cent., as the case may be, charging interest at 5*l.* per cent. and commission at 5*s.* on debtor accounts at the end of each half year. In the event of an account being closed by death or otherwise during a half year, interest and commission is charged to the time of such closing.

Cock's account was kept, and duly balanced half-yearly, from the time when it first commenced, according to this custom.

(A copy of this account was annexed as part of the case.)

At the time of the execution of the bond by defendant, the balance due from Cock to the Bank, upon his said account, amounted to 987*l.* 4*s.* 11*d.*: and he continued to keep his said account with the Bank from that time until the month of June, 1856.

It appeared from the account that, after the execution of the bond, and before 30th June, 1856, the advances from the Bank to Cock upon the old account on many occasions were not limited to, but exceeded 950*l.*; and that this was the case during the said period about one hundred several times. When the account so exceeded 950*l.*, the Bank, on many occasions, made fresh advances. It appeared also that, on each of three several occasions during the said period, the account, with inter-

est, exceeded 1000*l.*, and was not reduced within a month; and the defendant was not at any time informed that the said account with interest had reached the said amount, and had not been reduced within a month: nor was the defendant, after 30th June, 1856, informed of the *1077] state of Cock's account until the 3d September, *1856, as hereinafter mentioned. It appeared also that the only occasion upon which, at the taking of any of the half-yearly balances as aforesaid, the amount of Cock's account, with interest and commission, exceeded 1000*l.*, was on the occasion of the balance being taken on 30th June, 1852, when it amounted to 1004*l.* 10*s.* 1*d.*: but this amount was reduced, two days afterwards, below 1000*l.*, by payment of 12*l.* to Cock's credit. It also appeared that, on many occasions, just before the close of a half year, a bill of exchange was paid by Cock to the Bank on his account, although, on some of such occasions, the bill so paid in was not due till after the expiration of such half year. These were all trade bills; and Cock was a party to them.

On 21st April, 1853, defendant, who had previously had no communication with the Bank from the time when the bond was executed, except one communication from the Bank that Cock's account, including all interest, was 951*l.* 5*s.* 4*d.*, called at the chief office of the Bank at Workington, and inquired what was the state of Cock's account. Charles Brown was then dead; and the plaintiff, who had succeeded him as the general manager of the Bank, immediately attended on the defendant, and sent for the ledger which contained Cock's account. Upon this ledger being brought, the plaintiff opened it, and told defendant that the balance then due from Cock was a little over 950*l.* Defendant told plaintiff to get the balance reduced, and to inform her from time to time of the state of the account. In consequence of defendant's said request, plaintiff, on the same day, communicated with Mr. Cooper, who was at that time the agent for the Bank at the Cockermouth branch; and *1078] Cooper saw Cock on several occasions, and requested *him to reduce his account accordingly. Cock subsequently made the following payments to the credit of the account.

		£	s.
1853	30th June	93	10
"	31st Decr.	52	6
1854	30th Decr.	25	0

These are the only payments that Cock made to the credit of his account subsequently to April 21st, 1853.

There was a sum of 115*l.* paid by him into the Bank on the 27th March, 1854: but this sum was only paid in for safe keeping and upon an express agreement that it was to be returned to him within a week; which was accordingly done on 3d April following, viz., by a payment of 25*l.* to Cock himself, and by a payment of 90*l.* on Cock's check to one Mr. Gowell. Interest on this sum was, however, brought into the next half-yearly balance.

These were the only operations on Cock's account subsequently to 21st April, 1853, with the exception of the usual half-yearly debits of interest and commission: and it was by means of these debits that, on 30th June, 1856, the balance due from him to the Bank amounted to 996*l.* 12*s.* 11*d.*, the sum claimed in this action.

On 10th October, 1853, the plaintiff wrote to defendant as follows.

“Cumberland Union Bank, Workington,
“10th October, 1858.

“Madam,
“When you called on me, about six months ago, you requested me to inform you from time to time of the state of Mr. Robert Cock’s account with our Cockermouth branch. I beg therefore to state that he owes us at present on that account a balance of 91*l.* 16*s.* 8*d.*: and, [*1079 *though I have endeavoured to get him to reduce it, I have not succeeded.
“I am, &c.”

On 16th August, 1855, defendant called again at the Bank at Workington, to inquire into the state of the account, and was informed, by a clerk at the Bank, that the balance due from Cock was some sum under 950*l.*: and she then requested that Cock might not be allowed to draw any further on his account.

In July, 1856, Cock executed an assignment, for the benefit of his creditors, of his estate and effects. On 22d August of the same year, plaintiff wrote to defendant a letter of that date as follows.

“Cumberland Union Bank, Workington,
“22d August, 1856.

“Dear Madam,
“Robert Cock, of Lorton, having made an assignment of his goods and effects for the benefit of his creditors, it is my duty to inform you that we look to you for payment of the balance upon his current account with the Bank.

“I am, dear Madam, yours faithfully,
“W. B. GORDON, Manr.”

On 3d of September, 1856, a letter was sent by plaintiff to defendant, of which a copy follows.

“Cumberland Union Bank, Workington,
“3d September, 1856.

“Dear Madam,
“With reference to our previous correspondence, I now make demand upon you for the sum of 996*l.* 12*s.* 11*d.*, with interest from 30 June last, being the balance due from Robert Cock, of Lorton, on his current account with this Bank: and for which balance we hold your bond.

“I am, dear Madam, yours faithfully,
“W. B. GORDON, Manr.”

*Afterwards, the writ by which the action was commenced was issued; and, by the particulars of demand endorsed [*1080 thereon, the plaintiff claimed as follows.

“The following are the particulars of plaintiff’s claim.

“£996 12*s.* 11*d.*, for principal, interest, and other money due and owing from one Robert Cock to the within named banking Company, on the balance of his current account with the said banking Company on the 30th June, 1856; and which said balance is secured to the said banking Company by the joint and several bond of the said Robert Cock and the defendant, bearing date the 2d August, 1848.

“£9 19*s.* 1*d.*, for interest thereon, at 5 per cent. from the 30th June, 1006 12*s.* 0*d.* 1856.

“The plaintiff also claims interest at 5 per cent. on 996*l.* 12*s.* 11*d.* of the above sum, from the date of the writ until judgment.”

The defendant, in August, 1856, authorized a distress to be made on
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the goods of Cock for 1250*l.*, being the amount of five years of the said rent of 250*l.* mentioned in the mortgage-deed hereinbefore mentioned (no rent having been paid to her since the execution thereof). But, before any goods could be seized under the distress, all goods on the premises were removed by the trustees under the deed of assignment executed by Cock, and which they claimed to have passed under the deed; and no distress was put in. After this ineffectual attempt to distrain, and after the commencement of this action, defendant sold certain portions of the said mortgaged premises under the power of sale contained in the deed.

The net proceeds of the sale, being insufficient to satisfy the said sums of 1230*l.* and 200*l.* and interest, were applied as far as they would *1081] go in liquidation of those sums. And no payment of the said proceeds was applied in discharge of, or placed to the account of, the defendant's liability (if any) in respect of her suretyship for Cock.

The Court to have power to give judgment for plaintiff or defendant according as they may decide on the foregoing facts, to amend the pleadings, if necessary, and to draw such inferences of fact as a jury might draw.

The case was argued in last Term.(a)

Garth, for the plaintiff.—The facts do not raise an answer in equity. The defence suggested is that the understanding between the parties was that the liability on the bond was not to arise if the Bank made advances to Cock beyond 950*l.*, or at any rate if Cock's debt should exceed, with the interest, 1000*l.*, and not be reduced below that in a month, and defendant not be informed of this. It is manifest that the intention of the defendant was to render herself liable to the same extent as her husband, that is, unconditionally, to the amount of 1000*l.*, if advanced to Cock by the Bank. The mortgage-deed executed to defendant by Cock was conditioned to pay sums not exceeding in the whole 1000*l.* Defendant, by her letter of July 28, 1848, shows that the liability which she contemplated was only one restricted by the amount to be ultimately paid by her, and which she would not allow to exceed 1000*l.*; and her apprehension was that the bond, as drawn, would make her liable to pay more. Then she is given to understand that the bond cannot be altered, but that the amount advanced might be limited *1082] to 950*l.*, so as to leave a margin for interest. After that, a memorandum is given to her, on 2d August, 1848, to the effect that the advance is to be limited to 950*l.*; and that, if with interest it amount to 1000*l.* and be not reduced within a month, she is to be informed. Now, taking this as an agreement, if it were declared on as such, the damages would be limited to the amount of loss incurred by the now defendant by the advance exceeding 950*l.*, and the want of information given to the defendant of the fact that there was an excess with interest above the 1000*l.*, not reduced within a month. But even that effect could not be given to the agreement; because, at the moment when it was made, the advance exceeded 950*l.* At any rate, there is only ground for a cross action. Further, it may be fairly contended that the memorandum was to operate in favour of the Bank, who, upon

(a) January 22d. Before Lord Campbell, C. J., Wightman and Crompton, J.

the security being given, were entitled to refuse to advance above 950*l*. Even taking the memorandum as incorporated in the condition of the bond, the restriction could not be considered as importing that the bond was to be void if the advances exceeded the specified amount: *Parker v. Wise*, 6 M. & S. 239. The equitable plea must fail also on another ground, namely, that, if equity would in such a case grant an injunction, it would not be unconditional; but defendant would be required to give up the counter security which she has taken from the principal.

Aspland, contra.—The memorandum is not to be incorporated with the letters; though that, perhaps, is not very important. [Lord CAMPBELL, C. J.—If the defendant was to be absolutely discharged as soon as the *advance exceeded 950*l*., I do not see the object of giving [*1083 her the notice as to the 1000*l*.] The clause was clearly intended for the protection of the defendant, a protection which she could not have if Cock were allowed to increase his debt to the Bank to any amount, and only to be forced to reduce it at the half-yearly accounts. A condition of this kind is in the nature of a condition precedent, and must be performed, or the liability will not arise: *Whitcher v. Hall*, 5 B. & C. 269 (E. C. L. R. vol. 11). [CROMPTON, J.—That was a case in which the surety was held not liable because the principal had not received from the plaintiff what the agreement between the plaintiff and the surety required.] A stipulation for the benefit of the surety must be equally vital to the liability of the surety. In *Bonser v. Cox*, 13 L. J. N. S. Chancery 260, the surety gave a promissory note to bankers who were to give to the principal a draft for a certain sum payable in three months: instead of doing this, the bankers, in effect, advanced to the principal the sum which the draft was to have covered. Lord Lyndhurst, C., held that the surety was discharged, the transaction which had taken place being not that contemplated: and he said: “The law, with respect to principal and surety, is well known and settled; it is *strictissimi juris*. The party who is surety for another for the performance of an engagement, can only be called upon to guaranty the performance of that engagement, when the engagement is carried into complete, literal, and strict effect. The parties have no right, without the concurrence of the surety, and without his assent, to vary the engagement in any material circumstance; it must be strictly adhered to: it will not do to *substitute another engagement, although in [*1084 substance it may be the same, and although it may be more beneficial for the surety. He enters into a particular and specific contract, and that contract alone he is bound to perform. The law on this subject is well laid down by Mr. Justice Bayley in the case cited at the bar of *Whitcher v. Hall*.” With respect to the argument that the relief would not be unconditional because the defendant has taken a counter indemnity, that was a distinct transaction, antecedent to the giving of the bond; and there is nothing to hand over.

Garth, in reply.—*Whitcher v. Hall* and *Bonser v. Cox* are inapplicable: they are cases in which the surety was entitled to say that his guarantee could not be enforced because that in consideration of which he had become surety was not done. Here the transaction relied upon is with the surety himself. [CROMPTON, J.—Supposing it to create a condition precedent, the suretyship would be discharged if the sum agreed upon were exceeded by a farthing: if there be no condition pre-

cedent, the remedy is by cross action.] Only one advance appears to have been made after the defendant had requested that the amount might be reduced: and she seems to have acquiesced in this. As to the counter security, it is said in Story's Commentaries on Equity Jurisprudence, sect. 502:(a) "If the creditor should knowingly have done any act to deprive the surety of this benefit" (that is, enabling the surety to place himself in the place of the creditor), "the surety, as against him, *1085] would be entitled to the same equity as if the act had *not been done. On the other hand if a surety has a counter bond or security from the principal, the creditor will be entitled to the benefit of it; and may in equity reach such security to satisfy his debt." And in 20 Vin. Abr. 102, *Surety* (B), pl. 5, it is laid down: "A bond-creditor shall, in the Court of Chancery, have the benefit of all counter bonds or collateral security given by the principal to the surety; as if A. owes B. money, and he and C. are bound for it, and A. gives C. a mortgage, or bond, to indemnify him, B. shall have the benefit of it, to recover his debt:" for which *Maure v. Harrison*, 1 Abr. Ca. Eq. 93, is cited.

Cur. adv. vult.

CROMPTON, J., now delivered the judgment of the Court.

This was an action by the plaintiff, as registered officer of a banking company, on a bond given by the defendant as surety for one Robert Cock, on a banking account with the Company: and the question we have to decide is whether an equitable defence set up by the fourth plea can be maintained on the evidence set out upon the special case. No question arises on the pleadings, as we are requested to decide on the facts, and amend the pleadings as may be necessary.

It appeared that, after the death of the defendant's husband, whose executrix she was, a bond, by which he had been surety for one Cock, was given up; and a new bond, on which the present action was brought, was given by the defendant. The bond was executed by Cock and defendant; and the condition recites that *Cock had opened and *1086] then kept, and proposed to continue to keep, an account with the Bank; and that it had been arranged and agreed that, for the security of the Company, Cock and defendant, as his surety, should enter into the bond in question. And the condition of the bond was, and was declared to be, for the payment by Cock and defendant, or one of them, on demand, &c., of all and every such sums (*not exceeding in the whole the sum of 1000l. sterling*) as should from time to time be due and owing on account of money, cash and bills, notes, drafts, &c., lent, accepted, &c., and for the payment of charges and allowances for interest, &c., as usually charged by bankers.

The balance of the account, at the time of the execution of the bond, was 978l. 4s. 11d.; and that sum was the balance as against Cock, which formed the commencement of the account secured by the new bond. And such account was continued for several years, commencing with the above balance.

It is quite clear that in this bond there was no restriction against the Bank advancing more than the 1000l., so as to relieve the defendant from responsibility if more was advanced. There is no recital in the condition that the agreement had been that more should not be advanced:

(a) See also sect. 499 and the following sections.

but the limit is introduced into the words obliging the defendant to pay. She is to pay "not exceeding," &c.; and the words "not exceeding," &c., are clearly applicable to her liability, and not to any condition or restriction against giving a larger credit by the Bank. Even if there had been a recital that the agreement had been to give credit for the 1000*l.*, and the condition was for securing that 1000*l.*, it is well established by the judgments of the learned Judges in **Parker v. Wise*, 6 M. & S. 239, that unless the bond clearly showed that [*1087 the parties intended that the restriction was to operate as a condition upon which the whole security was to become void, the advancing to a greater amount would be no defence: and their judgments are strongly in point to show how unlikely and improbable such an arrangement is, and what strong expression of intention ought to be found before such a condition should be construed to arise as would make the whole bond void by a shilling being advanced beyond the stipulated amount. See also the cases cited in *Parker v. Wise* from the Equity Courts, showing that it is not against equity to advance further than the stipulated amount in such cases.

In the present case the defendant is to satisfy us that, from the correspondence and written agreement between the parties, which took place before and with reference to the execution of the bond by the defendant, there was a stipulation and condition, on the part of the Bank, that the bond should be avoided if the amount of 950*l.* was exceeded, or if the memorandum of the agreement afterwards mentioned was broken in any respect, however slight. We are by no means satisfied that there was any such arrangement by which the bond would be void so as not to secure any amount in the events which have happened.

It appeared that, when the defendant received the present bond for her perusal, she objected that the interest and charges might make her liable beyond the 1000*l.* This was the matter to be guarded against, as appears by her letter of July 28th, 1848, which is *directed [*1088 entirely to that objection, and contains no trace of any intention that her liability to pay anything should depend on any limit as to advance not being exceeded. In answer, the officer of the Bank, by his letter of 31st July, suggests that, if the amount exceeded 1000*l.* at their half-yearly accounts, they should require it to be reduced; or, he says, "We can limit the amount to 950*l.*, which would leave a sufficient margin for interest, &c."

It is stated in the case that the defendant went to the Bank, after this correspondence, and refused to execute the bond in the form proposed, on the ground that it would make her answerable for *more than she would agree to*: and a memorandum was given to her upon the faith of which she must be taken to have executed the bond in question.

The memorandum was in these words: "Robert Cook's advance to be limited to 950*l.*; and Mrs. Rae to be informed if the account with interest shall reach 1000*l.*, and not be reduced within a month."

This, it is to be observed, was not signed by Cook, but was a collateral agreement between Mrs. Rae and the Bank, not affecting the bond at law. But, if Mrs. Rae executed the bond on the faith that it was to be no security if the limit was exceeded or the memorandum broken, there would, we apprehend, be an equitable defence.

It appeared that, on many occasions, the limit of 950*l.* had been

exceeded. On three occasions the amount of 1000*l.* had been slightly exceeded without Mrs. Rae being informed of it, though it was not reduced within a month; and on one occasion, at the half-yearly account, the amount was 1004*l.* 10*s.* 1*d.*: but this amount was reduced under the 1000*l.* by a payment in two days.

*1089] *We are of opinion that the facts and documents do not show that there was any condition, within the rule of law as explained by *Parker v. Wise*, 6 M. & S. 239, by virtue of which the security was to be at an end if the limit of 950*l.* was exceeded, or if Mrs. Rae was not informed of the excess according to the agreement. The object of the parties in giving the memorandum, as explained by the letter and coupled with the letters, appears to be quite a different one. It is to be remarked that the amount when the memorandum was given was considerably more than 950*l.* So that it seems impossible that it could have been contemplated that the security was not to be operative at all by reason of that limit being exceeded; whilst that fact is quite consistent with the parties intending that the surety should only be liable to principal money to that extent. And, when we look at the expression in the bond itself, by which she is only to be bound to pay 1000*l.* and interest, the real meaning of the memorandum seems to be to substitute 950*l.* for 1000*l.* as the sum she was bound to pay as principal money under the bond. If there had been any restrictive words in the bond, which would have amounted to any such condition as could have made the bond inoperative if a shilling more than the specified sum had been advanced, the memorandum might perhaps have been held to have reduced the amount, the excess of which was to have put an end to the security. But, when the 1000*l.* is merely mentioned in the bond as the amount which the obligor was bound to pay, and no such restriction is found in the condition, the breach of which would, under the authority *1090] of *Parker v. Wise*, *have vitiated the security, we construe the memorandum as merely decreasing the sum mentioned in the bond as the principal money for which the defendant was to be liable in addition to the interest and charges. Another reason for this construction is, that the exceeding the limit is not at once to vitiate the security; for Mrs. Rae is to have notice; no doubt for the purpose of looking after the party, and perhaps of giving notice so as to terminate her future responsibility.

Even supposing that the words of the memorandum had the more stringent meaning attributed to them by the counsel for the defendant, it would by no means follow necessarily that the breach of such a collateral agreement would vitiate the security altogether. Where, by the recital of a bond or other instrument of guarantee, it appears that a certain mode of dealing is contemplated, or the honesty of the principal in a particular office is the subject-matter of the bond or agreement, then the bond or agreement is construed as an engagement to guaranty such dealing or the honesty of the party in the identical office; and the responsibility of the surety is strictly limited with reference to the particular dealings or office: but that seems to us very different from the case where a party gives an engagement of the present nature, without anything to show that it was intended that the bond should be entirely vitiated on the slightest breach of the agreement. It may be that the defendant would have a good cause of action or relief if she had suffered

from the breach of such matter, without the whole security being avoided.

The observations of the Judges in *Parker v. Wise*, 6 M. & S. 239, *are very strong to show how distinctly such condition should appear, and how great would be the inconvenience and improbability of such a contract as would entirely vitiate a security under such circumstances. [*1091]

In the present case we think that the defendant ought to make out that the contract of the parties, by the memorandum and under the circumstances, was that the whole security should be vitiated if the limit were exceeded or the notice not given: and, for the above reasons, we think that there was no such intention or agreement. And we think, therefore, that the equitable defence is not made out, and that our judgment should be for the plaintiff. Judgment for plaintiff.

The cases on the Hackney and Lamberhurst tithe commutation rent charges are omitted here for want of space, and will be reported in the succeeding volume.

MEMORANDUM.

In this Vacation :

Lord Cranworth resigned the office of Lord High Chancellor, and was succeeded by Sir Frederick Thesiger, Knight, one of Her Majesty's counsel, who afterwards *received a grant of the dignity of a Baron of the United Kingdom of Great Britain and Ireland, to him and the heirs male of his body lawfully begotten, by the name, style, and title of Baron Chelmsford, of Chelmsford, in the county of Essex. [*1092]

Sir Richard Bethell, Knight, resigned the office of Attorney-General, and was succeeded by Sir Fitzroy Kelly, Knight, one of Her Majesty's counsel.

Sir Henry Singer Keating, Knight, resigned the office of Solicitor-General, and was succeeded by Hugh M'Calmont Cairns, Esq., one of Her Majesty's counsel, who afterwards received the honour of Knight-
hood

ADDITIONAL CASES

17

The Court of Queen's Bench.

MICHAELMAS TERM, 21 VICT. 1857.

ARTHUR v. COLEMAN. *Nov. 4.(a)*

A contractor employed by a board of health to do a particular act, if guilty of negligence in doing the act, is personally liable for the consequences, and is not protected by the Health of Towns Act from being personally sued.

DECLARATION, that the defendant negligently and wrongfully dug a hole in the public highway, and put and placed earth, stones, and timber there, and continued the same during the night without a light to warn passengers, whereby the plaintiff's carriage was overturned, and the plaintiff injured.

Plea, Not guilty, by statutes 11 & 12 Vict. c. 63, and 13 & 14 Vict. c. 32.

The case was tried before Willes, J., in Essex, and a verdict returned for the plaintiff, damages 200*l*.

The Chelmsford Board of Health, by their surveyor Mr. Fenton, employed the defendant to remove a pump from a certain place and fix it on the spot in question. The defendant's workmen in digging the well threw up the earth, &c., and allowed it to remain at the mouth of the excavation during the night without any light to warn persons of the obstruction. The plaintiff in driving along in his gig was upset by the obstruction and injured as proved. It was contended that the defendant, being on the wrong side of the road, had contributed to the injury, because, if he had been on the right side, according to the law of the road, he would have avoided the obstruction, and moreover had the assistance of a gas lamp on that side of the road to guide him. The learned judge left it to the jury to say, whether the plaintiff had contributed to the injury. It was also further urged that the defendant was protected by the Health of Towns Act, ss. 138, 139, 140, and 169, the work being done *bonâ fide* in the course of the defendant's employment, and that if any one was liable the Board of Health should have been sued by their clerk. Upon this point the learned judge told the jury that in order to avail himself of this defence, the defendant must

satisfy them that he had executed the work bonâ fide under his employment, and not with recklessness or carelessness.

M. Chambers now moved for a new trial on the ground that the verdict was against the evidence, and for misdirection: *Sadler v. Henlock*, 24 L. J. 138, Q. B.; *Newton v. Ellis*, 24 L. J. 337, Q. B.; *Ward v. Lee*, 26 L. J. 142, Q. B.

Lord CAMPBELL, C. J.—I am of opinion that there should be no rule granted. The first ground relied on was, that the verdict was against evidence, and that the plaintiff had materially contributed to the injury. The plaintiff had a right to go on the side of the road on which he did go, when he had no reason to apprehend any obstruction. Although the rule of the road is very convenient and ought to be observed, still, if a person has no reason to suppose that there is any obstruction, he may go on the right or on the left side, or in the middle of the road. As to the light from the public lamp, it was for the jury to say whether there ought to have been another lamp at the obstruction, and whether there was not negligence in not having such lamp. I think the jury came to the proper conclusion that there was negligence, and that the plaintiff did not contribute to the injury. The next question then is, against whom the action should be brought. The defendant was employed by the Board of Health to do a particular act, viz. to dig a hole for a well. The defendant might have done that with his own hands, but he employed two servants to do it. They dug the hole in the highway. What they did he did; what they omitted to do, he omitted to do. They allowed the hole to remain during the night without a light to warn people of the danger. That was negligence in them, and it was also negligence in him, and unless some statute absolved him, he is liable for the consequences. It is said that the Health of Towns Act absolved him. It would be very strange indeed if there was such an enactment, viz., that persons guilty of negligence, whereby their fellow-subjects suffered grievous injury, shall be indemnified, and that others who are in no way culpable, and know nothing of the act, and on whom no obligation to guard against it rested, shall be liable, and shall be called upon to compensate the injured party. There is no such enactment in the Health of Towns Act, and no authority for any such position in the cases cited. The maxim *respondet superior* does not absolve the *inferior*, if by his negligence a loss has been sustained. Where there is no negligence in the party who acts in obedience to the instructions of the Board of Health, he is not liable; but if in doing the act he is guilty of negligence, whereby loss and damage are occasioned to another, he is personally liable. The case of *Newton v. Ellis* is no authority for the argument that the party who is guilty of the negligence shall not be answerable. That case only decided that the party liable was entitled to notice of action.

The rest of the Court concurring,

Rule refused.

Re M'INTOSH. Nov. 7.(a)

A plaintiff attending in his own case before an arbitrator, is privileged from arrest.

MILWARD yesterday obtained a rule calling on the sheriff to show cause why the applicant should not be discharged out of custody, he being plaintiff in an action, which had been referred to arbitration, and being in attendance upon the arbitrator when he was arrested.

Hawkins, for the plaintiff, now appeared to show cause. [Lord CAMPBELL, C. J.—Was he not privileged from arrest?] If so, this application ought to have been made to a Judge at chambers. [ERLE, J.—Is not a party attending an arbitrator within the principle which protects persons from arrest who are in attendance in a court of justice, *eundo, morando et redeundo*?] Not unless he is in attendance under compulsory process.

Milward, *contra*, was not called upon.

Lord CAMPBELL, C. J.—Let him be discharged. It is a clear right. Rule absolute.

(a) 30 Law Times Rep. 116.

Ex parte ABRAHAM HOPKINS. Nov. 23.(a)

Where an order of Quarter Sessions confirming a conviction is void on the ground of interest in the justices, this Court will grant a certiorari to bring up the order for the purpose of quashing it, with a view to a mandamus to enter continuances and hear the appeal.

GIFFARD moved for a rule for a certiorari to bring up an order of the Quarter Sessions of the county of Glamorgan, by which a conviction of the applicant for riding in a carriage on the South Wales Railway without a ticket, under a section of the South Wales Railway Act, was confirmed, for the purpose of quashing it, on the ground that certain of the justices who took part in hearing and determining the appeal were interested. There was a want of jurisdiction in the Quarter Sessions to hear the appeal. [ERLE, J.—If a court of appeal is interested, and the judgment reversed on that ground, does not the original judgment stand? *Dimes v. The Grand Junction Canal Company*, 3 H. L. C. 759, 17 Jur. 73.] In that case, the Lord Chancellor having on appeal affirmed an order of the Vice-Chancellor, and the decree of the Lord Chancellor having been treated as a nullity, on the ground that he was disqualified by interest, the House of Lords heard an appeal from the order of the Vice-Chancellor. [Lord CAMPBELL, C. J.—We might order the Quarter Sessions to enter continuances and hear the appeal. The subject cannot be deprived of his right to appeal by interested justices intruding themselves into the Sessions.]

By the Court (Lord CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and ERLE, Js.) Rule nisi.

The rule was made absolute in Hilary Term, no cause being shown.

(a) 4 Jurist, N. S. 529.

ADDITIONAL CASES

IN

The Court of Queen's Bench,

UPON WRIT OF ERROR

TO

THE HOUSE OF LORDS.

MICHAELMAS TERM, 21 VICT. 1857.

HOOPER and Others *v.* LANE and Others.(a) *June 26, 1856—
July 2, Aug. 28, 1857.*

The sheriff S. held a ca. sa. against B., lodged by L. more than a year before. A writ at suit of A., but void on the face of it, was then handed to S., who issued his warrant to his officer, who arrested B. thereon. B. applied to a judge at chambers and was discharged, whereon S. claimed to detain him on L.'s writ. But the judge discharged B. absolutely, and he left the country. L. then sued S. for negligence, the declaration alleging as the first breach the non-arrest, and as a second breach the arrest of B. on an invalid writ, whereby B. was discharged, and thereby L.'s writ became useless. S. pleaded not guilty to the whole declaration, and traversed particular allegations. The judge at the trial ruled that there had been no arrest on L.'s writ; that it was for the jury to say if S. was guilty of negligence towards L. in not knowing that A.'s writ was invalid; and that B. was set free from all writs by his discharge, which was no justification of S. The jury having found for the plaintiff, except on the issue on the second breach, and a bill of exceptions being tendered:

Held, affirming the judgment of the Ex. Ch. (Wightman, J., Erle, J., Martin, B., and Bramwell, B., dissenting), that the ruling was right.

Where the sheriff has arrested on one good and valid writ, he may detain on any number of valid writs which he had at the time of the arrest, or which may afterwards have reached him. But in the case of an arrest on an invalid writ it is different. Though the party arrested has been deprived of his liberty, that has been done in circumstances which make it the duty of the sheriff to discharge him. He has no right to treat him as a person deprived of his liberty, and an arrest on the valid writ is therefore necessary. But to allow the sheriff to make such an arrest, while the party is unlawfully confined by him, would be to permit him to profit by his own wrong, and therefore cannot be tolerated. The sheriff cannot arrest him, because he has already been deprived of his liberty; the sheriff cannot detain him because he is entitled to be discharged.

Barratt v. Price, 9 Bing. 566, confirmed.

If the sheriff, by the illegal act of himself or his officer, has taken a person unlawfully into custody, so that the custody amounts to a false imprisonment, the sheriff cannot avail himself of that illegal detention to execute against his body other writs which he holds at the suit of other plaintiffs.

(a) 27 L. J. Q. B. 75; 30 Law Times Rep. 33; 3 Jur. N. S. 1026. The syllabus of this case is taken from the report in the Law Times; the body of the case from the Law Journal Reports.

(1095)

The liberty of the subject requires that a person illegally arrested should have an absolute unqualified right against the person who has illegally arrested him, to be set at large without reference to what may be the consequence of his liberation to others.

Though for some purposes the sheriff is the agent of the party who puts a writ into his hands, he is not a mere agent. He is a public functionary having duties to perform as well towards those against whom the writs in his hands are directed as towards those who put those writs into his hands.

Discussion of the legal maxim that no one shall take advantage of his own wrong.

THIS was a writ of error brought against a judgment of the Court of Exchequer Chamber.

Case by Lane and others against the defendants below, who were sheriffs of Middlesex, for negligence in not arresting one A. Bacon under a writ of ca. sa. issued at the suit of the plaintiffs below. The declaration alleged that the said A. Bacon, at the time of the delivery of the writ to the defendants below, and from thence for a long space of time, to wit, &c., was within the said sheriffs' bailiwick, and the defendants during that period (the same being then a reasonable and necessary time in that behalf) might have taken and arrested the said A. Bacon by virtue of the said writ, if they would so have done, &c. Yet the defendants, &c., not regarding, &c., but contriving, &c., did not, nor would at any time after the said writ was so delivered to them as aforesaid, during the space of time aforesaid, although often requested, &c., and although a reasonable time had elapsed for them so to do, take, or cause to be taken, the said A. Bacon under and by virtue of the said writ, as by the said writ they were commanded, but therein wholly failed and made default, &c. For a second breach, it was alleged, that afterwards, &c., the defendants further contriving, &c., did not nor would take the said A. Bacon under the said writ, and wrongfully, unjustly, and illegally, by themselves, their agents and officers, to wit, on, &c., took and imprisoned the said A. Bacon under the false and illegal pretence of a certain other writ to them, the said sheriffs, directed, whereas in truth and in fact there never was any such writ, and then wrongfully and falsely detained and imprisoned the said A. Bacon for a long space of time, to wit, &c., and by means whereof the said A. Bacon was afterwards, to wit, on, &c., by a certain order of Sir T. Coltman, Knt., one of Her Majesty's Justices, &c., ordered to be and was discharged from and out of the custody of the defendants, and thereby the defendants during all that time last aforesaid while they so wrongfully imprisoned the said A. Bacon, and for a reasonable time after his discharge from his said imprisonment, were unable and could not and did not take, arrest, or detain the said A. Bacon under the said writ of the plaintiffs, but were obliged to suffer and permit the said A. Bacon to depart from their custody, and the said A. Bacon did then and immediately after his discharge from his said imprisonment, depart from and out of the custody of the defendants, and from and out of the bailiwick of the sheriffs of Middlesex (the defendants continuing and being such sheriffs as aforesaid), until a long time thereafter, to wit, until and on, &c., whereby the defendants continually from the time of the said wrongful arrest of the said A. Bacon until the said A. Bacon so departed from their bailiwick, to wit, for the space of eight days, lost and deprived themselves of the means of lawfully taking or detaining the said A. Bacon; and by reason thereof and of such departure from and out of the said bailiwick, could not at any time thereafter take the said A. Bacon under the said writ

of the plaintiffs, whereby the said writ of the plaintiffs became wholly useless, &c.

Pleas—first, not guilty, to the whole declaration; secondly, that the said Anthony Bacon was not in their bailiwick as alleged; thirdly, that they could not have taken and arrested the said A. Bacon, *modo et formâ*. Issues thereon. There were other pleas on the record, which it is not necessary now to consider.

At the trial, before Lord Denman, C. J., at the Sittings at Westminster, after Trinity Term, 1845, it was proved that a writ of *ca. sa.* at the suit of the plaintiffs below against Bacon, was delivered to the defendants below, they being the sheriffs of the county of Middlesex. It further appeared that a parchment was brought to the defendants' office, purporting to be a writ issued out of the Court of Exchequer, at the suit of one Arambura, against the said Bacon, endorsed for bail; that the defendants granted a warrant on such parchment to John Swayne an officer, and the attorney's clerk who brought such parchment informed Swayne where Bacon was to be found, and Bacon was arrested on such warrant, the officer having, at that time, no other warrant in his possession, and he detained Bacon in custody until discharged by the order of Coltman, J. It was further proved, that the said parchment was not signed or marked in the manner required on writs issued from the Court of Exchequer, that no *præcipe* had been filed for such writ in the proper office, and that in truth it was no writ at all. Coltman, J., made an order for the discharge of Bacon at the suit of Arambura, and after the making of that order, the defendants detained Bacon under the plaintiffs' writ until Coltman, J., made a second order for the discharge of Bacon, at the suit of the plaintiffs. It was likewise proved, that Bacon had, on his discharge, left the country. The Lord Chief Justice, on that evidence, directed the jury that there had been no arrest at the plaintiffs' suit; that the order of Coltman, J., was no justification to the sheriff; that if the jury believed the evidence which had been given, the defendants were liable to an action for negligence and laches in point of law, and that the jury ought to find a verdict for the plaintiffs; and added, that if the jury believed from the evidence that the defendants had been guilty of such negligence, the only question was the amount of damages in the cause. On this direction the defendants' counsel tendered a bill of exceptions, and insisted that the learned Judge ought not to have stated that if the jurymen believed the evidence they ought to find a verdict for the plaintiffs, and further insisted that the defendants had not been guilty of any negligence in having proceeded with the said pretended writ at the suit of Arambura, instead of the plaintiffs. The jury returned a verdict for the plaintiffs on all the issues (except so much of the first issue as relates to the second breach, which was found for the defendants), with 325*l.* damages.

Judgment was signed for the plaintiffs without any notice being taken of the finding on the second breach as to the first issue. A bill of exceptions was tendered, and the cause was heard in the Exchequer Chamber, when the judgment was affirmed: 10 Q. B. 546 (E. C. L. R. vol. 59); S. C. 17 Law J. Rep. (N. S.) Q. B. 89. A *venire de novo* was awarded on the ground that on the issue of not guilty as to the second breach, the Judge ought to have left it to the jury to say whether the defendants knew, or, if they had used reasonable care, ought to have

known, of the defect in the supposed writ. The cause came on again for trial in 1850, when the direction given was in accordance with the opinion of the Exchequer Chamber, and the verdict was given on the first breach for the plaintiffs, with 323*l.* 3*s.* 4*d.* damages, and on the second breach for the defendants. Another bill of exceptions was tendered, and the case again argued in the Exchequer Chamber and the judgment affirmed. Error was then brought to this House under the 15 & 16 Vict. c. 76, s. 155: 3 E. & B. 731 (E. C. L. R. vol. 77); S. C. 23 Law J. Rep. (N. S.) Q. B. 372.

The Judges were summoned, and Coleridge, J., Wightman, J., Cresswell, J., Erle, J., Williams, J., Crompton, J., and Crowder, J., and Martin, B., and Bramwell, B., attended.

H. Hill and Quain, for the plaintiffs in error, contended that the evidence disclosed a valid arrest of Bacon by the plaintiffs in error on the ca. sa. issued by the defendants in error, which was not affected by the supposed arrest at the suit of Arambura; that if there had been no valid arrest in the first instance, still there was one at the time when the sheriff, upon attending before Coltman, J., claimed to detain Bacon at the suit of the defendants in error. That the order of discharge, made by Coltman, J., warranted Bacon's discharge, and was a good answer to this action. That judgment in error ought to have been entered upon the second breach for the plaintiffs in error, for that the first issue, so far as it related to that breach, was found in their favour. They cited *Semayne's Case*, 5 Rep. 91; *Barratt v. Price*, 9 Bing. 566 (E. C. L. R. vol. 23); S. C. 2 Law J. Rep. (N. S.) C. P. 56; *Pearson v. Yewens*, 5 Bing. N. C. 489 (E. C. L. R. vol. 35); S. C. 8 Law J. Rep. (N. S.) C. P. 255; *Collins v. Yewens*, 10 Ad. & E. 570 (E. C. L. R. vol. 37); S. C. 8 Law J. Rep. (N. S.) Q. B. 332; *Robinson v. Yewens*, 5 Mee. & W. 149; † S. C. 8 Law J. Rep. (N. S.) Exch. 166; *Howson v. Walker*, 2 W. Black. 823; *Barclay v. Faber*, 2 B. & Ald. 743; *Barrack v. Newton*, 1 Q. B. 525 (E. C. L. R. vol. 41); S. C. 10 Law J. Rep. (N. S.) Q. B. 182; *Hodges v. Marks*, Cro. Jac. 485; 2 Rol. Abr. tit. *Process*; *Grenville v. The College of Physicians*, 12 Mod. 386; *Gregory v. The Duke of Brunswick*, 3 Com. B. 481 (E. C. L. R. vol. 54); S. C. 16 Law J. Rep. (N. S.) C. P. 35, 2 H. L. Cas. 415; *Gray v. Friar*, 15 Q. B. 891 (E. C. L. R. vol. 69); S. C. 19 Law J. Rep. (N. S.) Q. B. 393, 4 H. L. Cas. 565; Com. Dig. tit. *Pleader*; *Benton v. Sutton*, 1 Bos. & P. 24; *Watson v. Carroll*, 4 Mee. & W. 592; † S. C. 8 Law J. Rep. (N. S.) Exch. 97; *Dalton's Sheriff* 103; *Hall v. Hawkins*, 4 Mee. & W. 590; † S. C. 8 Law J. Rep. (N. S.) Exch. 87; *Davis v. Chippendale*, 2 Bos. & P. 282; *Wells v. Gurney*, 8 B. & C. 769 (E. C. L. R. vol. 15); *In re Eggington*, 2 E. & B. 717 (E. C. L. R. vol. 75); S. C. 23 Law J. Rep. (N. S.) M. C. 41; *Thurland's Case*, 2 Dyer 244 b; *Percival v. Stamp*, 9 Exch. 167; † S. C. 23 Law J. Rep. (N. S.) Exch. 21; *Taylor v. Cole*, 3 Term Rep. 292; *Newton v. Harland*, 1 Man. & G. 644 (E. C. L. R. vol. 39); *Harvey v. Brydges*, 14 Mee. & W. 437; † S. C. 14 Law J. Rep. (N. S.) Exch. 272.

Watson and Doudeswell, for the defendants in error, insisted that the sheriffs, having issued their warrant and arrested Bacon under a void writ, and by means of a bailiff, who had no warrant under the writ of the defendants in error, were trespassers, and no valid arrest of Bacon had been made by them. That the order of Coltman, J., had been

founded on the circumstance of the conduct of the sheriffs having been illegal, and consequently could not form any justification for them in omitting to arrest Bacon on the valid writ of the defendants in error, and that the question of the sheriffs' negligence was either a question of fact, in which case it had been properly left to the jury, and properly decided, or a question of law, and then it ought to have been decided in favour of the plaintiffs below, the now defendants in error. They commented on the cases already cited, and further referred to *Ex parte Ross*, 1 Rose 260; *Ex parte Hawkins*, 4 Ves. 691; *The Attorney-General v. Dorkings*, 11 Price 156; *The Attorney-General v. Carl Cass*, *Ibid.* 345; *Frost's Case*, 5 Rep. 89; *Barlow v. Hall*, 2 Anst. 461; *Loveridge v. Plaistow*, 2 H. Black. 29; *Birch v. Prodder*, 1 N. R. 135; *Fitz. Abr.* 248.

The Lord Chancellor, at the conclusion of the arguments, moved that the following questions should be put to the judges:—Whether, attending to the pleadings in this case, and the evidence appearing on the bill of exceptions,

First, When the officer of the plaintiffs in error took Anthony Bacon into custody, at the suit of Arambura, he was in their lawful custody under the valid writ of ca. sa. which was in their hands at the suit of the defendants in error?

Secondly, If Bacon was not then in their lawful custody, whether, when the plaintiffs in error afterwards brought him in custody before Coltman, J., he was then in their lawful custody at the suit of the defendants in error?

Thirdly, Whether there was any evidence for the jury that the plaintiffs in error were guilty of a breach of duty towards the defendants in error in arresting Bacon under Arambura's writ?

Fourthly, Whether there is error in the judgment by reason of there being no entry discharging the plaintiffs in error without day, as to so much of the breach on the plea of not guilty as was found for the plaintiffs in error?

Fifthly, Whether there is such inconsistency in the findings of the jury, on the plea of not guilty and on the seventh plea, as makes a venire de novo necessary?

The Judges requested time to answer these questions. Ordered.

BRAMWELL, B.—My Lords, in this case the finding of the jury as to the second breach lays that out of the question, and I think that the second, third, fourth, and fifth pleas were properly found for the plaintiffs below; for though I think the defendants might reasonably have contended that the third plea should have been found for them, yet I do not read the exception as taking that objection. It seems to me that as a sheriff is not liable to an action for not arresting unless he improperly omits to look for the debtor or to arrest him when he knows where he is,—and, as “not guilty” only puts in issue the not arresting, and the power to do so is part of the inducement which is traversed by the third plea, the defendants might have contended that having no notice that Bacon was the person in Lane's writ, they had no notice that Bacon was in their bailiwick, and so could not arrest: but this objection seems to me not taken; and if so, all that remains to be considered is the direction as to the first plea to the first breach, and that direction is, “that there had been no arrest by the sheriff at the suit of

Lane." The residue of the direction is, I think, only applicable to the second breach. It is important to fix precisely the meaning of the first breach. It cannot be read as merely charging that the sheriff did not originally arrest in Lane's action; otherwise it is bad, as it would be no cause of action that the sheriff did not arrest originally at Lane's suit, if the sheriff had Bacon in his lawful custody under the writ in that suit. As the declaration originally stood, the complaint seemed to be "that the defendants did not originally arrest at Lane's suit, and originally wrongfully did arrest under the void writ,"—thus showing, if the plaintiffs were right in their contention, that Bacon never was in lawful custody, and so the damage arose; and though the latter allegation is negatived by the verdict, it seems to me that to hold the declaration good without it, necessarily involves holding that the allegation "that the defendants did not arrest," has the meaning I attribute to it, viz., did not arrest, and never had Bacon in lawful custody.

The question then is, was there an arrest or lawful custody by the sheriff at the suit of the plaintiffs? The facts are, that the sheriff had a *capias ad satisfaciendum* against Bacon at the suit of Lane, which had been lodged more than a year; that a document purporting to be a *capias* at the suit of Arambura was brought to the sheriff by him; that this document was void for want of the formality of stamping it with a stamp at the Exchequer Office, the doing of which at that time was a matter of course; that there issued a warrant on it to Swayne to take Bacon; that Swayne did take him on that warrant; that Bacon claimed to be discharged out of custody because the supposed *capias* was void; and that an order was made for his discharge, but the sheriff claimed to detain him on Lane's writ; that Coltman, J., by a second order, ordered Bacon to be discharged. It is also to be borne in mind that all these proceedings of the sheriff were *bonâ fide* and not wrongful, wilfully, or negligently. There not only is no evidence to the contrary, but the finding on the second breach is conclusive to this effect on the plaintiffs at least.

It is clear upon the facts that Bacon was, if not on Swayne's original taking, at least when the sheriff claimed to detain him, in fact as much taken and in custody of the sheriff as any person ever is or can be. It cannot be necessary that the sheriff should personally seize or imprison, nor does the law recognise one place more than another as a lawful place of imprisonment by the sheriff. Then as an actual taking by the sheriff of Bacon, or the issuing of a warrant under Lane's writ and a fresh taking under it, and a removing of him by the sheriff or bailiff to any other place would have been nugatory, nothing more could be done, and consequently Bacon must be considered to have been, in fact, taken and detained by the sheriff under Lane's writ. Then, why is this to be held no arrest or custody in point of law? In detaining him the sheriff is only doing what Lane's writ commands. The sheriff has intentionally done no wrong; Bacon is where he ought to be; he has sustained no loss; and Lane is enjoying that right which the law gives him. To hold that Bacon is not in lawful custody is to do an injustice to Lane, to deprive him of his right for no default of his, and to give him instead a right, no doubt, but a right of action only for such damages as a jury may give, and against the sheriff, who is generally more but may be less solvent than the debtor. It is also to deal unjustly by the sheriff, who,

if the debt is large, may have to pay heavy damages for a small mistake; while, if the debt is small, he may pay but a very small sum for very gross misconduct; and who in either case is liable to the person taken for the exact amount of the damage sustained by his wrongful act. So that to hold this in Bacon's favour is to give him more than an equivalent for the loss he has sustained by his original wrongful capture, and to enable him to deprive his creditor of his rights by availing himself of his privilege from arrest *redeundo*, as was done in this case.

This is indeed "wild justice," as the learned editors of Smith's *Leading Cases* say in their note to *Semayne's case*—wrong to all parties, sheriff, creditor, and debtor. And the only argument that can be suggested in favour of the law being as the plaintiffs contend, is, that otherwise the defendants would take advantage of their own wrong. The advantage to the defendants is, that they do their duty to Lane; or, if they are right in saying that they ought to have been permitted to retain Bacon, the advantage will be that they do so without issuing a second warrant to Swayne on Lane's writ. The wrong is nothing, unless the omission of a form, viz., giving the second warrant to Swayne, can be called a wrong, and that omission and the whole wrong were purely unintentional; and it is strange that the defendants might by any artifice, any false pretence, have induced Bacon to leave a place of safety, and then lawfully have taken and kept him; and yet that under the present circumstances they could neither keep him nor let him go and retake him before he had time to get away. However, suppose they have gotten an advantage, and that they have done a wrong and thereby gotten that advantage, and that it is immaterial that the wrong was unintentional, are they taking advantage of their own wrong? Does the rule that no man shall take advantage of his own wrong apply here? I think not, and for two reasons: the first is, that it seems to me that that rule only applies to the extent of undoing the advantage gained, where that can be done, and not to the extent of taking away a right previously possessed. Thus, if A. lends a horse to B., who uses it, and puts it in his stable, and A. comes for it and B. is away, and the stable locked, and A. breaks it open and takes his horse, he is liable to an action for the trespass to the stable, and yet the horse could not be got back, and so A. would take advantage of his own wrong. So, though a man might be indicted at common law for a forcible entry, he could not be turned out if his title were good. So, if goods are bought on a promise of cash payment, the buyer, on non-payment, is subject to an action, but may avail himself of a set-off, and the goods cannot be gotten back. So, if I promise a man I will sell him more goods on credit if he pays what he already owes, and he does so, and I refuse to sell, I may retain the money. So, if I force another from a fishing ground at sea and catch fish, the fish are mine. Other instances might be given. It seems, therefore, that the maxim referred to is inaccurately applied by the plaintiffs, and that it means that no one shall gain a right by his own wrong; and not that if he has a right he shall lose it, or the power of exercising it by a wrong done in connection with it; and perhaps on this distinction (but for the second reason I shall mention), had the defendants seized Bacon in Surrey, and brought him into Middlesex, they could not lawfully have kept him there, as that would have been to give themselves a right by, and to take advantage of, their own wrong.

It seems to me, therefore, that on this ground the maxim in question is not applicable to this case. But, secondly, I think it is never applicable where the right of a third party is to be affected, as here, viz., the right of Lane;—I know of no case to that effect. Can one man by his wrongful act to another deprive a third of his right against that other? Lane had a right to have Bacon taken and kept at any moment. Could the sheriff, by wrongfully taking Bacon, deprive Lane of that right? It seems strange that he should be able to do so. I cannot see any principle to justify it—and there are cases to the contrary. A. obtains goods from B. under a contract of sale, procured by A. from B., by fraud. A. sells to C.,—C. may retain the goods—*White v. Garden*, 10 Com. B. 919 (E. C. L. R. vol. 70). (a) Surely A. might recover the price from C. at which he sold to him; yet he would, in so doing, take advantage of his own wrong. So, if my lessee covenants at the end of his term to deliver possession to me, and in order to do so forcibly evicts one to whom he had sub-let for a longer term, and I take possession without notice, surely I can keep it; at least, at the common law I could. So, if a sub-lessee at an excessive rent purposely omits to perform a covenant, the performance of which would be a performance of the lessee's covenant to his lessor, and by such non-performance the lessee's covenant is broken, and the first lessor enters and avoids the lease and evicts the sub-lessee, the sub-lessee may defend himself against a claim for rent by his lessor—*Logan v. Hall*, 4 Com. B. 598 (E. C. L. R. vol. 56). (b) Yet, there he takes advantage of his own wrong, because of the right of the third person. So, if I sell goods, the property not to pass till payment or tender, and the vendee has a week in which to pay, and during that week I re-sell and deliver to a third person, no action is maintainable against me as for a detention or conversion, but only for non-delivery; yet there I take advantage of my own wrong, because the right of a third party has accrued. On these grounds, then, it seems to me that the maxim in question is not applicable to the present case.

It is also said, that the reason why there was no arrest by the sheriff under Lane's writ is, because an arrest under one writ only enures as an arrest under others when it is lawful; and no doubt that may be so, if there is nothing more than the mere arrest by the bailiff. For example, if Bacon had escaped from Swayne immediately on his arrest, the sheriff could not have justified breaking open a house, on fresh pursuit, to take him at Lane's suit, as on an escape. But to apply that reasoning to the present case is to beg the question, and to lose sight of the fact, that the sheriff in fact did take Bacon, and have him in his custody on Lane's writ—see the judgment of Parke, B., 9 Exch. Rep. 71.† And surely it cannot be doubted that if Bacon, while the sheriff was claiming to detain him on Lane's writ, had escaped, the sheriff would have been liable to an action for an escape.

It is further said that the proper mode for a sheriff to execute a capias is by warrant to a bailiff. But, with submission, it seems clear that he may execute process himself, and his under-sheriff may execute it by virtue of his general authority. Pleas by a sheriff justifying under process never set forth any warrant, but always alleged that the sheriff

(a) S. C. 20 Law J. Rep. (N. S.) C. P. 166.

(b) S. C. 16 Law J. Rep. (N. S.) C. P. 252; per Maule, J., 625; Peacock *arguendo*, 621.

himself did the act complained of. The law is so laid down in *Dalton* 106; and in *Norton v. Simmes*, Hob. 12, it was held, that an arrest by an under-sheriff was a good arrest; and the under-sheriff is described as "in the nature of a general bailiff errant to the sheriff," and "an under-sheriff is in effect but a sheriff's deputy." Now, it is in this case expressly stated that the deputy of the sheriff, the under-sheriff, claimed to detain Bacon under Lane's writ. It seems to me absurd, as well as contrary to the authorities above cited, to say that any additional power to detain Bacon could have been acquired either by a warrant being issued to take him who was already taken and in custody, or by the under-sheriff or sheriff physically taking hold of Bacon or putting him in Whitecross Street Prison in preference to any other place of detention. It seems to me, therefore, that there was a lawful caption and custody of Bacon under Lane's writ, though there was no warrant on it, whether that caption or custody is considered as made by the sheriff through the under-sheriff, or whether it is considered as made by the under-sheriff by virtue of his general power. But it is further objected that, as the original taking of Bacon by Swayne was a false imprisonment at the sheriff's command, the sheriff never could take or detain him till that unlawful imprisonment had ceased. In the first place I ask why? And I am aware of no answer except that founded on the maxim I have adverted to. It is said the law is very tender of the liberty of the subject. No doubt, and properly; but the liberty of the subject is protected by rational and not arbitrary provisions. This principle of the law must operate according to rules of law, and not independently and in violation of them. I have endeavoured to show that legal rules and principles would be violated by holding that Bacon was not in custody, and that the liberty of the subject may be sufficiently vindicated without holding that he was not.

But let us try to put this argument into the shape of a general proposition, thus:—"Wherever a man is taken or imprisoned unlawfully, he must be free before he can be lawfully taken and imprisoned." That cannot be true, for it cannot be doubted that if an entire stranger to the sheriff forcibly took a person against whom the sheriff had a *capias*, to the sheriff or to a bailiff with a warrant on that *capias*, the debtor might and must be detained. This is clear from *Howson v. Walker*, and from *Robinson v. Yewens*. The proposition then must be limited. Try it thus:—"Wherever a man is taken or imprisoned unlawfully by any person or his agents, he must be set free by that person and his agents before he can be lawfully taken by them." But is that true? Would it be contended that if the defendants had had process against Bacon for treason or felony, he could not have been detained, but must have been let go at large? There must then be another limitation of the general rule denying the inability to detain, limited to an inability to detain on civil process. But if so, what is the reason of the rule? If regard for the liberty of the subject is not enough to justify the rule to the extent to which I first supposed it, why is it enough to justify it to the limited extent I have last supposed? To this no answer is given. Further, the two cases of *Howson v. Walker* and *Robinson v. Yewens* are both opposed to such a proposition. Still further, this case is not within that limited rule; for it cannot be supposed, nor is there evidence, that the sheriff himself issued the warrant on Arambura's pretended writ;

nor did he in fact or in law authorize the under-sheriff to issue warrants on any but true writs. Now, though he might be liable for the unauthorized use of his seal by the under-sheriff, yet if he had revoked that under-sheriff's authority, and himself personally appeared before the Judge and claimed to detain Bacon, why should he not? Suppose the under-sheriff had fraudulently and knowingly issued the warrant under Arambura's pretended writ—how could that be said to be the act of the sheriff? The under-sheriff has no authority to commit a fraud, nor has he as between him and the sheriff authority to issue warrants where there are no writs. Why, then, might not the sheriff say in this case—"I did not authorize the unlawful taking of Bacon; I may indeed be liable to him for it, but as I did not authorize it, it was not by me or my agent he was unlawfully taken, therefore it is as though a stranger took him, and I consequently may lawfully take and hold him."

I cannot, then, see any reason or rule to justify the plaintiffs' contention; but while I can see no reason to justify the law being as the plaintiff contends it is, there does appear, in addition to the considerations of convenience and justice which I have mentioned, a strong reason in point of law in support of the defendants' contention. It cannot be said that the custody, at Lane's suit, was wholly null,—that is to say, Bacon might, if he pleased, have assented to it, so that a discharge by Lane would have been a satisfaction of the debt; and, had Bacon taken no steps to get discharged for a reasonable time, he would have lost his right to object to continuing in custody; if so, Bacon had an option to consider himself in custody, at Lane's suit, or not, as he pleased, and he had that option during a reasonable time, to ascertain the facts, and make his complaint to the Judge, and procure his discharge; and, had Coltman, J., erroneously (as the plaintiff would say), refused to discharge him, he would have had that option till the then following Michaelmas term, a period of three months. This, in truth, would have been an option as against Lane, who, during that time, would have been unable to take, with certainty, any proceedings founded on Bacon being in lawful custody. How did Bacon get such an option against Lane? How did Lane get put into the situation of having such an option against him? Not by anything Lane did, but by the act of the sheriff. But can it be in the power of one man, by the breach of duty which the law casts on him, to prejudice the position of an innocent third party in this way? As a matter of reason and principle, then, I think the plaintiffs wrong in their contention, and the defendants right in theirs.

But it is said that the authorities are in the plaintiffs' favour, and I therefore proceed to consider them. The earliest seems the 18 Edw. 4, Pasch. 4, cited and approved in Semayne's case, 4th Resolution. It was there held, that though the sheriff in executing a fieri facias ought not to break open an outer door, yet if he does and seizes, the execution is good, though he is a trespasser in entering the house, and liable to an action for it. The case is identical with the present, except that here the execution is against the body. The sheriff has procured possession of the goods and the body wrongfully; yet he may rightfully detain the goods—why not the body? Thurland's case is the same way. There a person had been illegally taken by the sheriff, at the instigation of one who is called the plaintiff's factor, but who had no authority to commit the particular illegality; and a valid writ having been procured,

the custody was held lawful. The Countess of Rutland's case, 6 Rep. 53, is not inconsistent with this. She was unlawfully imprisoned and on a false ground, until the sheriff took her; it is observable that he is not indicted. Nor is *Kerby v. Denby*, 1 Mee. & W. 336,† S. C. 5 Law J. Rep. (N. S.) Exch. 162, inconsistent with this, for there the entry was justified, which was part of the illegal act. It is not to be lost sight of, however, that in *Percival v. Stamp* a distinction is suggested between takings of the body and of goods, which is also discussed, and doubted, in *Smith's Leading Cases* 89.

The first two cases would justify the proposition to the full extent, namely, that where there is no personal default in the suitor, he is entitled to the benefit of the execution, let the sheriff have executed it as he may—which I own seems to me but reasonable. But there are other cases which, no doubt, go to show that the suitor on whose behalf the original wrong was committed, must suffer thereby, *but no other*, and this may be on the ground that the sheriff is the suitor's agent, or in the nature of one, to execute his process; as it is well known that the execution of process is conducted a very great deal on the personal directions of the party or his attorney. So that the act of the sheriff is to some extent that of the suitor; and then the maxim that no one shall take advantage of his own wrong might properly apply—see per Parke, B., in *Hall v. Hawkins*, and per Lord Campbell in *Egginton's case*. Of course, if such an argument is well founded, the person wrongfully arrested would properly be discharged at the suit of the person on whose behalf the wrong was committed; but no such argument is applicable to the case of a third person, as Lane. For though, on the same reasoning, the sheriff was Lane's agent to execute his writ, misconduct in executing *Arambura's* writ was no misconduct as agent of Lane. If *Bacon* is to be considered as having been taken at Lane's suit when first seized, no doubt that seizure was unlawful. But why should it be so held when it is borne in mind that the very reason why that capture was unlawful was because *Swayne* had no command from the sheriff to arrest at Lane's suit? It seems monstrous that to make the act of taking illegal it may be said there was not an arrest at Lane's suit, and that to make the subsequent custody illegal there was an arrest at Lane's suit.

The following cases support this view:—*Howson v. Walker*, where the detention at the suit of the third party was held good, though the Court expressly held the arrest to be illegal, and discharged the defendant at the suit of *Howson* for that reason—*Arundel v. Chitty*, 1 Dowl. P. C. 499; and in *Egginton's case*, Lord Campbell, and Coleridge and Erle, Justices, gave their judgment, discharging the prisoner on the same ground.

The two cases, 11 Price 344, and 11 Price 156, and *Barlow v. Hall*, are cases of misconduct by the party and not by the officer. The cases of *Ex parte Ross* and *Ex parte Hawkins* were also cases of no illegality by the sheriff, who was bound to arrest, but of privilege in the persons arrested, viz., a privilege *morando* and *redeundo*, and they might properly be said to be *redeundo* till they were out of all custody. Those cases may be shown to be different from the present in this way, that Lord Eldon says the parties must have notice; but in the present case *Coltman, J.*, held that Lane had nothing to do with the question of the

propriety of the arrest, which was a question between Bacon and the sheriff only.

The cases of *Pearson, Collins, and Robinson v. Yewens*, are decided on other considerations, viz., in *Collins v. Yewens* and *Pearson v. Yewens*, on the ground of collusion by the sheriff with the original wrongful taker; and in *Robinson v. Yewens*, on the ground that there was no such collusion, and consequently that the sheriff might detain. The first two cases, therefore, held that the sheriff was wrongful in his attempt to detain for the plaintiffs in those cases; and the last case, escaping from the injustice of *Barratt v. Price*, held that he was not, and the decisions were accordingly. However, it cannot be denied that they affected to be guided by *Barratt v. Price*, and that is the first case that I can find where it was held, that there being no wrong in the party issuing the process, and no wrong in the officer in the actual execution of that process, but some wrong by him in the original capture of the debtor under other process, the rights of the first and innocent party were prejudiced, and that the debtor could not lawfully be detained at his suit; and, indeed, it is the first case where that was held true of the party at whose suit the arrest was, where there was no personal misconduct in him or his agent; for in the case of *Howson v. Walker* it seems tolerably clear that the defendant was kept in illegal custody by Howson's attorney till he could get the officer and the warrant.

Now in *Barratt v. Price* the ground of decision is, that the first arrest was illegal by the wrongful act of the sheriff himself. The only reason given why that should be a ground is, "that where the sheriff has by his own act illegally arrested the defendant, the defendant is not in custody under the first writ: he is suffering a false imprisonment, and such false imprisonment, being no arrest in the original action, cannot operate as an arrest under the other writs lodged with the sheriff." But why this is so is not said, and even if true as to the original arrest it is, I have observed, simply begging the question as to the subsequent detention. To make the sentence complete, and applicable to the case to be decided, it should have proceeded thus: "and the sheriff cannot independently arrest or detain under the other writs." But why? No reason is, nor, I think, can be given.

Further, with great respect, the case of *Howson v. Walker* is undistinguishable from *Barratt v. Price*, and is misunderstood in the judgment of Tindal, C. J. He says the illegal arrest by *Herns* was no act of the officer or sheriff. But the Judges, in *Howson v. Walker*, said that an illegal arrest will not protect a man against his other creditors; he must still be amenable to law, unless some privity or collusion be shown, and the circumstance of employing the same officer does not amount to any proof of that, and they discharged the defendant at the suit of *Howson*; clearly, therefore, holding that as to him he was in custody and illegally arrested by the officer at *Howson's* suit. And in *Robinson v. Yewens* (which being in a court of co-ordinate jurisdiction would of course be governed by *Barratt v. Price*), with submission it may be observed, that, according to the authorities, the sheriff would have been clearly liable to an action for the first arrest by *Slowman*, which was wrongful—and therefore, according to the dictum in *Barratt v. Price*, this should have prevented the sheriff from arresting afresh or detaining. It is true that in *Barratt v. Price* the officer endeavoured to make the original

arrest appear legal, and it may be said thereby identified himself with it. But it is equally manifest that the officer in *Howson v. Walker* did the same. And how in reason could it be that Barratt lost his right to detain Price, because the officer Jackson endeavoured to screen his son's misconduct, when, if he had thought fit to disavow his son's conduct, and had himself taken Price, it seems, according to the judgment in *Barratt v. Price*, that Jackson might have detained him, and treated his son's act as the act of a stranger not connected with the officer? It is true, according to the report in *Moore & Scott*, vol. 2, p. 634, that the son was assisting his father in the execution of the warrant; but surely that ought to make no difference, as otherwise a plaintiff has an additional peril, and may lose the fruits of his execution from the misconduct of the sheriff, the bailiff, or the bailiff's man.

With respect to *Hooper v. Lane*, 10 Q. B. 546 (E. C. L. R. vol. 59), S. C. 17 Law J. Rep. (N. S.) Q. B. 189, it is enough to say, no reason is given for the opinion there expressed. It is founded on the authority of *The Countess of Rutland's Case*, which, with great respect, is misunderstood.

There is a further argument in favour of the defendant. Lane's writ commanded the sheriff to have the body of Bacon at Westminster to satisfy Lane. The theory of the writ is that the defendant is brought to the court, and on not satisfying the plaintiff, is put into the prison of the court; why, when he is brought there by the sheriff, should the court not give the plaintiff his right?

It seems to me, then, that the authorities and legal principles, reason and convenience, justify me in saying that an execution, however irregularly executed, is good for the benefit of the party where he is void of blame. But if that proposition is too extensive, then I think at all events it is good for a party's benefit, where there is no irregularity in the executing of his execution, though there may have been a wrong or irregularity by the sheriff in his conduct to the defendant in relation to some other execution. Consequently, that in this case Mr. Justice Coltman's order was wrong; Bacon was taken by the defendants, and in lawful custody at Lane's suit; that Lord Denman misdirected the jury; that judgment ought to be reversed, and a *venire de novo* awarded.

I have not as yet noticed a distinction between this case and *Barratt v. Price*, because I have been addressing myself to the question whether or not Bacon was *de jure* in custody: and on that question I think *Barratt v. Price* is not to be distinguished from this case. No doubt there is a distinction between this case and *Barratt v. Price* in this, that there was no intentional wrong in the defendants or their officer. This difference would be important if Bacon had no legal right strictly so called, but a mere power of calling on the Court to exercise its discretion to prevent an abuse of the process. I believe this is all he really had—a question I shall presently consider. But if Bacon had a strict legal right, I think the *bona fides* of the defendants makes no difference; for the right, if right at all, of Bacon to complain, is the same as that which Price had, viz., a legal wrong done him. But I think *Barratt v. Price* wrongly decided, and that it will be best at once to overrule it. Of course it is advisable to abide by decided cases, if possible, but this is not like a case affecting contracts, or a matter in reference to which people act and make their arrangements, where any change in the law,

unknown to most people, is no doubt *per se* inconvenient. *Barratt v. Price* is a case which determines what shall be done where a wrong or blunder is committed. People do not act on the supposition that such things will occur, or if they do so act, they deserve but little consideration. I may observe that this case is in this dilemma—If the judgment is affirmed, and no reason given except the authority of *Barratt v. Price*, no principle will be settled, no certainty obtained, and litigation will not be prevented. If any principle is laid down, it seems to me it must, to be of any use, be of some general character, to this effect: that wherever the sheriff, his officers or bailiff, or any of his assistants, in any way does or sanctions anything illegal, in or towards arresting a person, all that person's creditors, including the one at whose suit he was arrested, not only have him not arrested, but lose the right of arresting him till he has determined within a reasonable time whether or not he will apply to be discharged, and if he does so apply, until the Court has determined whether he shall be—a general rule which it seems to me would be most mischievous and unjust.

But there appears to me another reason why the judgment should be reversed and a *venire de novo* awarded, even if Mr. Justice Coltman's order was right, and the sheriff was not entitled to detain Bacon at Lane's suit, namely, that Bacon had no legal right, strictly so called, to be discharged, but a mere power of calling on the Court to exercise a discretion to discharge him to prevent abuse of its process. Now, the breach found for the plaintiffs is, that Bacon was not arrested at the suit of Lane, which I think means was never in custody at Lane's suit; but whether it has that meaning or not, I think it is equally disproved; for it is clear that if Bacon had been brought before a judge or court on a *habeas corpus*, and the detention under Lane's writ returned, he must have been remanded. Further, suppose Bacon had sued Swayne for arresting him, Swayne would have been without justification; but had Bacon sued the defendants, it seems clear they could have justified; for if not, Bacon might have stayed in prison for a year, and then got himself discharged, and sued the sheriff, who would have been without justification under the writ, for no lapse of time could make that writ a justification which was not so originally. Besides, what would have been the course of pleading? Bacon would have alleged an imprisonment by the defendants. They would have justified under Lane's writ. If Bacon then new assigned that he complained of a different trespass, namely, a taking under Arambura's pretended writ, he would indeed have been entitled to recover for all the trespass up to the taking under Bacon's writ, but he would have admitted the validity of that taking. He must therefore have replied in some way to that plea. Would it have been a good replication to state the facts and say, True, you had a good writ against me, but you had a bad one; you took me under the bad one, and kept me afterwards under the other. I think not. It is clear that if a man has a good and bad cause, and acts under the latter, he may justify under the former: *Oakes v. Wood*, 2 M. & W. 791, S. C. 6 Law J. R. (N. S.) Exch. 200, and *Dr. Grenville's case*. This affords an answer also to the assertion, that the defendant would not justify this taking. Perhaps not, up to where Bacon was in their actual custody; but thence they could. Bacon, in truth, had no right to be discharged,

but the Court, to prevent an abuse of its process, had power to discharge him.

The plaintiffs' complaint, therefore, if well founded, should have been in form, that though the defendants took Bacon, yet they took him under such circumstances as to give him an option of being discharged, if he thought fit; and he availed himself of it, and so Lane was damaged. Perhaps the declaration originally meant this—and this is important in substance; because, thinking, as I do, that Coltman, J., exercised an erroneous discretion, I think that if any action had been maintainable for such a complaint, the damages might have been very different from the present. On this ground also I think the direction wrong, even if *Barratt v. Price* is law.

Upon the point of no judgment being entered for the defendants, on the plea of not guilty, as to the part found for them, I think the defendants are entitled to judgment on that. I think that the Common Law Procedure Act, 1852, s. 157, does not apply to authorize your Lordships to give such judgment as the Queen's Bench ought to have done; for the words of the section are, "as the Court," i. e., Exchequer Chamber, "from which error is brought, ought to have done." But, independently of that statute, I think that Court, and consequently the House of Lords, could give the proper judgment: *Pollitt v. Forrest*, 11 Q. B. 962 (E. C. L. R. vol. 63); S. C. 16 Law J. Rep. (N. S.) Q. B. 424. If not, this defect ought to be amended.

I am further of opinion that there is nothing in the defendants' objection that the finding on the first plea to the second breach, and the finding as to the ninth plea are repugnant. It is enough to say that the findings are not repugnant, for the ninth plea does not put in issue the words "wrongfully, unjustly, and illegally," which are denied by the general issue, and the materiality of which is shown by the judgment in this case: 10 Q. B. 546 (E. C. L. R. vol. 59); S. C. 17 Law J. Rep. (N. S.) Q. B. 187.

In conclusion, I answer your Lordships' questions as follows:—The first, in the negative. The second, in the affirmative. Third, there was no evidence of a breach of duty in arresting under Arambura's writ. But as a sheriff is bound to arrest as soon as he can, and as the sheriffs could have arrested under Lane's writ, when they arrested under Arambura's, there may have been evidence of a breach of duty in neglecting to arrest at Lane's suit as soon as they could; but that is not the breach of duty complained of, nor in respect of which damages have been given. Fourth, I answer this question in the affirmative. Fifth, and this in the negative.

CROWDER, J.—To your Lordships' first question, "Whether, when the officer of the plaintiffs in error took A. Bacon into custody at the suit of Arambura, he was in their lawful custody under the valid writ of *ca. sa.*, which was in their hands at the suit of the defendants in error," I answer in the negative.

The facts of the case lie in a very narrow compass. The plaintiffs in error, being sheriff of Middlesex, had received a writ of *ca. sa.* at the suit of the defendants in error, against A. Bacon, some time prior to the 2d of August, 1843, on which day a writ, purporting to be a writ of *capias ad respondendum* (invalid upon the face of it as not being signed), at the suit of Arambura, against the said A. Bacon, was handed to the

sheriff, and the sheriff issued a warrant thereon to his officer, Swayne, who arrested A. Bacon upon it. Thereupon A. Bacon applied to Coltman, J., to be discharged; and the learned judge made an order for his discharge. Upon this the under-sheriff, who was present at the judge's chambers, without releasing A. Bacon, procured a warrant upon the *ca. sz.* of the defendants in error, and while A. Bacon was in his actual custody, claimed to detain him on the *ca. sa.* of the defendants in error; but Coltman, J., ordered his discharge from the custody of the sheriff on that writ, and A. Bacon, then being discharged and at liberty, departed out of the country, and could not afterwards be retaken.

The defendants in error then brought an action against the plaintiffs in error for negligence in omitting to take A. Bacon on their *ca. sa.* when they could have done so; and charging in the declaration that they negligently and unlawfully took A. Bacon upon an invalid writ, at the suit of Arambura, from which he was discharged by Coltman, J.; whereby damages were sustained to the amount of their debt. It was proved at the trial that when A. Bacon was seized under Arambura's invalid writ, he had money in his possession wherewith he could have paid the debt of the defendants in error, which the jury found, and returned a verdict against the plaintiffs in error for that sum. Several issues were raised by the pleadings, and a bill of exceptions having been tendered upon certain rulings of the learned judge, Lord Denman, who tried the cause, the first question propounded by your Lordships arises.

Now, the law is clear, that when there are several writs in the sheriff's hands, and he issues a warrant upon one to his officer who arrests the defendants, such arrest operates as an arrest on all the writs then in the sheriff's hands. And the plaintiffs in error contend that as Swayne, the officer, had a warrant upon Arambura's writ, upon which he arrested A. Bacon, such arrest operated as an arrest on the *ca. sa.* of the defendants in error, and that so A. Bacon was lawfully in the sheriff's custody. Had the arrest been lawful under Arambura's writ, that would clearly have been so. But it seems to me as clearly the contrary, when it appears that Arambura's writ was invalid upon the face of it, and that therefore the arrest by Swayne was unlawful. It would be a strange anomaly, and at variance with every principle of law, if a trespass which subjects the sheriff to an action for wrongfully depriving a man of his liberty could enure as a lawful arrest or detainer for any purpose whatever. It cannot be doubted that whenever the writ is a nullity upon the face of it, the sheriff who arrests upon it is liable to an action for false imprisonment. The liberty of the subject has at all times been estimated by the law of England at so high a value, that the slightest attack upon it has been held actionable; and, therefore, when the law prescribes certain formalities as requisite to make an arrest valid, the omission of any of them renders the arrest illegal, and subjects the sheriff to an action. It seems to me, therefore, quite plain that, although a valid arrest on one of several writs operates as an arrest on all, and so places the party arrested in the lawful custody of the sheriff, under each of those writs; yet that an unlawful arrest, for which an action for false imprisonment would lie against the sheriff, is no arrest at all, and gives no lawful custody of the party arrested to the sheriff.

To your Lordships' second question, I answer also in the negative. A. Bacon was brought before Coltman, J., to be discharged, because he

was unlawfully in the sheriff's custody by an act which rendered the sheriff liable in damages for false imprisonment. The judge ordered his discharge out of the sheriff's custody, which I think he was bound to do, notwithstanding the under-sheriff claimed to detain him upon the *ca. sa.* of the defendants in error; Bacon having been unlawfully arrested by the sheriff, there was no detainer upon any of the writs in the sheriff's hands; all that the judge had before him was a pretended writ invalid upon the face of it, a warrant upon that writ, and an arrest under the warrant. The sheriff being a wrongdoer, and liable as such to an action for false imprisonment, tried to avail himself of a certain writ in his possession under which he might have lawfully arrested the debtor, in order to save himself from the consequences of his negligence on the discharge of the debtor out of custody. When he sought to detain Bacon at the suit of the defendants in error, he did so, not in the interest of the defendants in error, but to save himself harmless; well knowing that if Bacon after being discharged could not be retaken, he, the sheriff, would be fixed with damages probably to the amount of the debt due to the defendants in error. All the arguments, therefore, at your Lordships' bar, on the part of the plaintiffs in error, as to the extreme hardship on the defendants in error that the wrongful act of the sheriff, assuming it to be a wrongful act, should deprive them of their execution against the body of Bacon, seem to me to be of little weight. The defendants in error did not complain, nor do they now complain, that Coltman, J., discharged Bacon. A plaintiff is entitled to have his writ put in execution with due diligence, and if any damage results to him from the sheriff's negligence, the sheriff must reimburse him for any loss thereby sustained. The defendants in error were perfectly satisfied with the sheriff's security instead of that of their debtor. And, generally speaking, no damage in fact results to a plaintiff who attempts to take the body of his debtor, where the sheriff is substituted for such debtor. In case, therefore, of an illegal arrest, by the sheriff's misconduct, the sheriff is made responsible for damage arising to other creditors whose writs are in his hands, from the discharge of the debtor out of custody; because he could have made, and therefore ought to have made, a valid legal arrest upon each of their writs, by which the debtor would have been in lawful custody. In the present case the sheriff was alone to blame for the unlawful arrest. It was contrary to the sheriff's duty to issue his warrant to the officer upon a writ appearing on the face of it to be invalid. Had he exercised the most ordinary attention, and looked most cursorily at Arambura's pretended writ, which was not signed, he must have perceived that it gave him no authority to arrest Bacon. Therefore, although the penalty is great, it cannot be denied, I think, that it was gross carelessness in the sheriff to issue his warrant on such an invalid writ. The whole force of the argument on his behalf amounts to this, that he is too severely punished for his carelessness.

But whatever weight there may be in the reasoning of the plaintiffs in error upon principle, the authorities seem conclusive against them. In *Ex parte Ross*, the sheriff's officer had arrested an uncertificated bankrupt while attending the Commissioner on his final examination. Application was made to Lord Eldon for his discharge upon the ground of privilege; and although it was opposed by other creditors who had writs

of *ca. sa.* in the sheriff's office at the time, and who were precisely in the same position with reference to the prisoner and the sheriff as the defendants in error in the present case, the prisoner was discharged out of the custody of the sheriff. In that case, although the arrest was illegal, not because the writ was void, but because the debtor was at the time privileged from arrest, which it was said the sheriff ought to have known, yet the position of the debtor when brought before Lord Eldon by the sheriff to be discharged was exactly the same as that of A. Bacon when before Coltman, J. In both cases the debtor arrested was then in the actual custody of the sheriff, who held writs of *ca. sa.* from other creditors wholly innocent of the unlawful arrest. The same reason which induced Lord Eldon to order the discharge in the one case would justify the judge's order in the other.

In *Ex parte Hawkins*, there was a discharge by Lord Loughborough under similar circumstances. And I take it that these decisions proceeded upon the ground that the sheriff was to blame for making such an arrest, and that he could not avail himself of his own wrong to detain in custody one who had been thus wrongfully brought into it.

The case, however, mainly relied on by the defendants in error is *Barratt v. Price*, where the sheriff's officer had inveigled the debtor, against whom many writs lay in the sheriff's hands, into the sheriff's custody, and there he was arrested upon a legal warrant issued by the sheriff upon a legal *ca. sa.* And it was held, that the prisoner was entitled to his discharge, not only as against the creditor at whose suit he was wrongfully arrested by the contrivance of the party with a sheriff's officer, but also as against all the other creditors whose writs of *ca. sa.* were then in the sheriff's hands, and who were in no way concerned in the arrest. This case is denied to be law by the plaintiffs in error, and if law, is alleged to be distinguishable from the present case. First, is it law? It has been recognised and acted upon in many cases since decided in each of the three common law courts of Westminster Hall. Its principle has been frequently explained and approved of, and it was not suggested at the bar that any judge had ever expressed a doubt of the correctness of that decision. It was a considered judgment, pronounced in 1833, by a very eminent judge, Tindal, C. J., as the opinion of the Court of Common Pleas; and since then, in 1839, it has been recognised as law in the Queen's Bench, in *Collins v. Yewens*, by Lord Denman, C. J., Littledale, J., Patteson, J., and John Williams, J.; and in the same year in the Common Pleas, in *Pearson v. Yewens*, by Tindal, C. J., Bosanquet, J., Coltman, J., and Erskine, J.; and in the Court of Exchequer, in *Robinson v. Yewens*, by Parke, B., Alderson, B., and Maule, B. It has been since brought prominently before the Court of Queen's Bench, in the year 1841, in *Barrack v. Newton*, and assumed to be law by that Court. And recently in *Egginton's Case* it has been again solemnly recognised by Lord Campbell, C. J., and the other judges of the Queen's Bench, and explained by Coleridge, J. To which list of authorities may be added this very case of *Hooper v. Lane*, in the Exchequer Chamber, where the same doctrine was confirmed by the late Lord Truro, delivering the judgment of the Court of Exchequer Chamber, consisting of himself, and Coltman, J., Maule, J., and Williams, J., and Parke, B., Alderson, B., Rolfe, B., and Platt, B.

After such a mass of authorities, and the concurrent opinion of so

many judges in its favour, it seems to me difficult to maintain that the doctrine laid down in *Barratt v. Price* is not law. But it is said, nevertheless, not to be law, because it is at variance with prior authorities, and with reason and good sense. Is it at variance with prior authorities? The old case in the Year Book, 18 Edw. 4, Pasch. 4, *a*, is cited as against it. There, in executing a *fi. fa.* illegally, it was held that though the action lay for the breaking, &c., yet that the value of the goods taken could not be recovered back, because the execution-creditor was entitled to them under his *fi. fa.* And it is argued that the law must be the same whether goods are taken under a *fi. fa.* or the body of the debtor under a *ca. sa.* But I have always considered the distinction clear in law between the two cases; and that although the goods may be retained on an illegal seizure, the body cannot be detained on an illegal arrest, upon the ground of the immense importance constitutionally attached by the common law to personal liberty. And I find the judges, in *Percival v. Stamp*, advertent to this distinction. In that case it was assumed at the bar that under an illegal arrest the body of the debtor could not be detained, and an attempt was made in argument to assimilate the wrongful seizure of goods to a wrongful arrest. Pollock, C. B., there says—"With respect to an arrest of the person, the decisions have proceeded on the principle that the subject is not to be deprived of his liberty by means of an illegal act on the part of the sheriff. If a sheriff illegally arrests a debtor, that is a false imprisonment, and therefore the sheriff cannot detain him under a subsequent legal writ, but is bound in the first place to give him an opportunity of going at large. But in the case of an execution against goods, there is no analogous injury, and we ought not to establish a new principle when no authority can be found to support it"; and Parke, B., says—"Mr. Hill has relied upon the authorities with respect to an arrest of the person. No doubt if an arrest be made on a Sunday, or in any way not authorized by law, the sheriff cannot afterwards make that valid by detaining the party under a legal writ, but must first give him an opportunity of going at large, and then execute the legal writ. But that is not so with regard to an execution against goods; and therefore, in this case, the illegal seizure did not prevent the defendant from afterwards executing a legal warrant. The same principle ought not to be applied to an execution against the person and an execution against goods."

In answer to this strong body of authority, I can only discover one single case which appears to have an opposite tendency, and that is *Thurland's case*. The report, which is rather obscure, alleges that a factor or agent of the plaintiff had colluded with the sheriff to arrest the defendant without any lawful writ or warrant, and when so arrested had procured a *ca. sa.* for the plaintiff's debt to be handed to the sheriff, who thereupon detained him under it, and upon application for his discharge the report says that the Court fined several persons, and amongst others the sheriff and the plaintiff's factor, for their misconduct, but refused to discharge the defendant out of custody, because the plaintiff was proved not to have been privy to the wrongful arrest, and there was a *bonâ fide* debt due to him from the defendant. Although the agent acting for the plaintiff's benefit was fined, yet the plaintiff was allowed to take advantage of his agent's act, because it was not proved that he was himself privy to it—a very dangerous doctrine, to say the least of

it, and not likely to be followed at the present day. I may observe also that Thurland's case is not even referred to in any of the later cases which have been brought to our attention.

Howson v. Walker is much relied upon by the plaintiffs in error as an authority adverse to *Barratt v. Price*. But I think the true distinction between the two cases is taken by the Court both in *Barratt v. Price* and also in *Collins v. Yewens*. In *Howson v. Walker* it was a stranger who committed the trespass under which the defendant came into the custody of the sheriff, and a second arrest was regularly made under a regular writ and warrant by the sheriff's officer, not in collusion with the party making the first arrest. Tindal, C. J., says, in *Barratt v. Price*,—"But the plaintiff relies on the case of *Howson v. Walker* as decisive in his favour. Upon looking, however, at the facts of that case, we think it is distinguishable from the present. In that case, Herne, who broke into the house and made the arrest, does not appear to have been connected with the sheriff's officer who held the warrant and afterwards made the arrest under it. In the first place, no warrant whatever had been made out to Herne. Again, when Howse, the sheriff's officer to whom the warrant in the action was directed, heard of the transaction he went to the defendant, and having another warrant also against him at the suit of Crowden, carried him to gaol and charged him with both these actions. The sheriff's officer, therefore, did nothing to identify himself with Herne. The illegal arrest of the defendant by Herne was no act of the officer or the sheriff, but the act of a stranger. The taking the defendant to prison and charging him in the action at the suit of Crowden was in fact a new arrest rather than a detainer, and there was no more objection to the sheriff arresting the defendant in this second action, because at the time he found him he was illegally imprisoned, than if he had found him at large." Also, in *Collins v. Yewens*, Lord Denman, having cited the language of Tindal, C. J., in *Barratt v. Price*, adds—"It is obvious that the same observations will apply where the first arrest is by a mere stranger and wrongdoer; for in such case the writs in the sheriff's office cannot operate. But if in such case a bailiff having a warrant arrests the defendant, already illegally in custody, without collusion with those who so have him in custody, such arrest is legal, inasmuch as the defendant is not by such illegal custody privileged from arrest under legal process; and this is the true ground of the decision in *Howson v. Walker*."

But it is further argued, on behalf of the plaintiffs in error, that, assuming *Barratt v. Price* to be law, it only decides that a subsequent detention upon a valid writ after an illegal arrest cannot be made where the illegal arrest was effected by the "misconduct" of the sheriff in making the arrest, which the Court, in *Barratt v. Price*, held to have been proved in that case. Whereas, in the case at the bar, it is said there was no such misconduct of the sheriff, but merely a mistake in arresting upon an invalid writ. Surely the short answer to this is, that whenever the conduct of the sheriff in making the arrest subjects him to an action for false imprisonment, the law must regard such conduct as "misconduct" in making the arrest. The result is the same to the debtor, who has equally been deprived of his liberty by the sheriff without the sanction of the law, whether by reason of a seizure without any warrant or writ, or by reason of a seizure under a warrant issued

upon a writ invalid on the face of it. The sheriff must be presumed to know, on the delivery of a writ to him for execution, whether it be a lawful writ or not. And it can hardly be doubted, I think, that issuing a warrant upon a writ invalid upon the face of it is gross neglect of duty and misconduct in the sheriff. Therefore the judgment of the Court below cannot be reversed without overruling *Barratt v. Price*.

Now, although I am not prepared to say, if the case were *res integra*, that I should not be disposed to treat the sheriff more leniently, yet I can find no sufficient ground for holding that *Barratt v. Price* is not law.

To your Lordships' third question, I answer that there was evidence for the jury that the plaintiffs in error were guilty of a breach of duty towards the defendants in error in arresting Bacon on Arambura's writ. This follows, I think, from the negative answer to the first two questions. For the natural consequence of such an arrest was the discharge from custody under a Judge's order; and the arrest of Bacon under Arambura's writ is conclusive evidence against the sheriff that he could have then arrested him under the *ca. sa.* of the defendants in error. And I think there was ample evidence of breach of duty in executing a writ void upon the face of it, instead of the valid writ of the defendants in error.

To the fourth question, I answer that, in my opinion there is error in the particular suggested by that question. But I think your Lordships have power to give the proper judgment, and so do justice to the plaintiffs in error.

To the fifth question, I answer that, regard being had to the pleadings to which the several findings of the jury apply, there is no such inconsistency in those findings as makes a *venire de novo* necessary.

MARTIN, B.—My Lords, the material facts set out in the bill of exceptions are these:—Upon the 1st of August, 1843, a supposed writ of *capias* out of the Court of Exchequer, at the suit of one Arambura against one Anthony Bacon was delivered to the defendants, the sheriff of Middlesex, endorsed for bail for 780*l.* Upon this supposed writ a warrant was granted by the sheriff to one Swayne, his bailiff. On the 2d of August Swayne arrested Bacon, and took him to his own lock-up house, where he remained in custody for ten or twelve days. The writs of the Court of Exchequer are sealed by the Chancellor of the Exchequer, and signed by a stamp at the office of the Court of Exchequer, without which there is no lawful writ or authority from the Court. Upon inquiry being made by an attorney on behalf of Bacon, it was discovered that the writ of *capias* was not stamped with the Exchequer stamp; a summons was therefore taken out before the late Mr. Justice Coltman for the discharge of Bacon from custody at the suit of Arambura, and an order was made to that effect. Upon search being made at the sheriff's office for detainers, a writ of *ca. sa.* was found at the suit of the present plaintiffs, tested the 14th of May, 1842, under which the sheriff insisted upon keeping Bacon in custody. Thereupon, another summons was taken out in the action at the suit of the present plaintiffs against Bacon, calling upon the sheriff to show cause why Bacon should not be discharged out of custody in that action. The summons was attended on behalf of the sheriff, when it was objected, first, that the plaintiffs (Lane and others) ought to have been summoned; secondly, that Bacon

ought to be detained in the sheriff's custody under the *ca. sa.* at their suit. Coltman, J., held, that there was no necessity for summoning the present plaintiffs, and made an order that Bacon should be discharged out of custody under the *ca. sa.*, and in obedience to it Bacon was discharged by the sheriff. The present action was afterwards brought, and at the trial, before the late Lord Denman, C. J., he ruled, and directed the jury that, upon the facts before stated, there was in law no arrest by the sheriff at the suit of the present plaintiffs, and this was a matter of law material to the decision of the cause.

If the questions upon which the correctness of this ruling depends were new, and there had been no decisions or dicta of the Judges bearing upon them, I cannot think that there would be much difficulty in arriving at the true legal conclusion. The arrest of Bacon made by Swayne under the warrant in the name of Arambura was illegal, there being no legal authority for it; but at this time the sheriff had had delivered to him, and had then in his possession, a legal writ of *ca. sa.* at the suit of the present plaintiffs, by which he was commanded and authorized, and it was his duty, to arrest Bacon. In the absence of authority I should have thought that when Bacon came into the direct custody of the sheriff in his prison, or when the sheriff actually and in fact acted upon this *ca. sa.*, from thenceforth Bacon was in lawful imprisonment under that writ, at the suit of the present plaintiffs. Up to the time of Bacon being placed in the prison of the sheriff, or of the sheriff actually acting upon the plaintiffs' writ, I think the imprisonment was illegal, and that the sheriff is liable to an action for it, and for the illegal arrest; but after that time I should have thought the imprisonment lawful, and that the sheriff could justify under the plaintiffs' writ. The supposed answer is, that to hold this would allow the sheriff to avail himself of his own wrong; and if the sheriff was alone concerned it might be a satisfactory one; but the sheriff is not the sole person concerned, on the contrary, there is another person, viz., the plaintiffs in the execution, who have a very much greater concern and interest; they have done no wrong, they placed their writ in the hands of the sheriff, not by any voluntary choice or selection of their own, as to the person or agent whom they desired to execute it, but by compulsion of law, which forced them so to do; as regards them, Bacon is where he ought to be, in the custody of the sheriff, in order by the duress of imprisonment to coerce him to pay his debt; and it seems unreasonable that the plaintiffs should be deprived of the advantage of the custody of the debtor's body, because the sheriff in another matter with which the plaintiffs have no concern, has been guilty of an unlawful act, and for which he is in law liable to make compensation in damages.

But there are various cases and opinions of Judges upon the subject, and I have given them the best consideration in my power. They have already been referred to in the judgment of my Brother Bramwell, and I need not repeat them, but in my opinion the cases of *Thurland*, and *Howson v. Walker*, decided before *Barratt v. Price*, cannot be reconciled with the cases of *Pearson v. Yewens* and *Collins v. Yewens*, as decided afterwards. As to the decision itself in *Barratt v. Price*, upon the supposed authority of which the two latter cases were decided, I think its correctness depends upon whether or not the Court arrived at a true conclusion as to a matter of fact. The son of the officer who had the

warrant having met the defendant, seized him and delivered him to a policeman upon a fictitious charge of felony; he then went to his father, who came with the warrant and arrested the defendant. If the Court arrived at a correct conclusion as to the fact that, under the circumstances, the officer was mixed up with his son in the original taking, I think the decision was right, and for this reason, that if the officer had had warrants upon all the writs then in the sheriff's office, the arrest would have been illegal as to all; and this seems to me to afford the correct rule, viz. if the circumstances be such that the defendant would be entitled to his discharge, notwithstanding that the officer had a warrant issued to him on the plaintiff's writ in his possession at the time of the actual arrest, then I think that the defendant is entitled to be discharged, notwithstanding that the sheriff seeks to act upon the writ for the first time at a period subsequent to the actual arrest. But, on the other hand, if the circumstances be such that if the officer had had at the time of the arrest a warrant upon the writ in respect of which the discharge is sought, the arrest would have been lawful; then I think the sheriff is legally bound to detain the defendant upon the lawful writ, notwithstanding that the original arrest was made illegally and without lawful authority, and the defendant entitled to be discharged had there been no other writ.

In the case of *Robinson v. Yewens*, Parke, B., says, "The old rule was, that if the sheriff had several writs against the same party, and arrested him on one of them, he is considered in custody on all;" but his Lordship adds, "the case of *Barratt v. Price* introduced the very proper and reasonable distinction, that in order that this consequence should follow, the first arrest must not have been illegal by the wrongful act of the sheriff." If this was meant to express the wrongful act of the sheriff himself, I concur; but if it was meant the wrongful act of the sheriff by reason of the act of his bailiff, acting on a warrant on one writ, there being another writ in the office on which the sheriff afterwards acted, I cannot concur. The cases of *Pearson v. Yewens* and *Collins v. Yewens*, were decided upon the authority of *Barratt v. Price*; but they go beyond the judgment, although probably not beyond some expressions used by Chief Justice Tindal in delivering it; they, however, are at variance with *Thurland's case* and *Howson v. Walker*, which, in my opinion, are the more correct legal decisions.

The error (as I consider it) in these cases appears to me to have arisen from the improper application of two well-known rules of law, one, that the sheriff is responsible for the acts of the bailiff done in the execution of writs. This rule is founded upon grounds of public policy, in order to protect the subject from oppression, and give him secure redress against any illegal act done under colour of legal process: *Wood v. Finnis*, 7 Exch. Rep. 363, S. C. 21 Law J. Rep. (N. S.) Exch. 138. But this rule has reference to the sheriff alone, and does not affect the parties to the writ. The other is, that when the sheriff arrests in one action it operates as an arrest in all actions in which the sheriff holds writs against him at the time. I think this rule does not, indeed cannot, extend to an arrest by a bailiff acting under a warrant in a particular suit, and that before the rule operates some act must be done by the sheriff himself, or by some authority which represents him, for all purposes connected with the writs in his hands. The arrest of *Yewens* was

attended with a very remarkable circumstance. There were writs against him from all the courts in the hands of the sheriff at the time of the arrest, and the Court of Exchequer refused to discharge him as against the Exchequer writs, upon the fact being deposed to by affidavit that there was no collusion between the sheriff and the person who made the arrest. Any one acquainted with the practice of the office of the sheriff of Middlesex would know that such collusion could scarcely exist, as the practice of that office is not to interfere directly with arrests, but to leave the matter entirely with the officer: *Robinson v. Yewens*.

The cases being thus conflicting, I think I am at liberty to adopt the rule which seems to me the most correct in point of law, and in my opinion it is that which I have already expressed.

This rule would provide for all cases of arrest of privileged persons, and such cases as might occur similar to that of *Barratt v. Price*, and has the advantage of being plain, and simple, and of easy application, and not likely to lead to such a result as occurred upon the arrest of *Yewens*, viz. that the Courts of Queen's Bench and Common Pleas discharged him, while the Court of Exchequer detained him in custody, the original arrest being one and the same act as regarded all.

It may be urged, that if my view of the law be correct, the consequence would follow that the arrest of *Bacon* by *Swayne* could be justified by the sheriff, upon the well-known principle that if a man has two supposed authorities to do an act, one of which is bad in law and the other good, and he does the act, professing to act upon the bad one, he may nevertheless justify under the good one, and successfully defend himself. But I think this is not so. *Swayne* clearly would have no justification, and the sheriff is, by the well-known legal rule before mentioned, upon grounds of public policy, liable for the unlawful act of his bailiff, and, in my opinion, so long as *Bacon* was merely in the custody of *Swayne*, and until he was either placed in the sheriff's prison, or the plaintiff's writ actually put in force against him, the latter writ was not in operation at all; and in the event of the sheriff attempting to justify under it, his plea would be effectually answered by a new assignment, to which he could give no valid answer.

I am therefore of opinion that the first exception is well founded. As to the second exception, I have a very great doubt whether there was any evidence of neglect of duty as against the plaintiff; but it is not necessary for me to give an opinion upon it. As to the third, it seems scarcely relevant to the case.

My answers to the questions proposed by your Lordships, are, First, that *Bacon* was not in the custody of the sheriff under the writ of *ca. sa.* at the suit of the defendants in error, upon the arrest at the suit of *Arambura*, nor until some act was done on behalf of the sheriff under that writ. Secondly, that he was in lawful custody at the suit of the defendants in error when he was brought by the sheriff before *Coltman, J.* Thirdly, I am rather inclined to think that there was no evidence to go to the jury; but this is an extremely difficult question to answer upon such evidence as is set out in this bill of exceptions. Fourthly and fifthly, I agree with the opinion of those who have preceded me.

WILLIAMS, J.—In answer to your Lordship's first and second questions, I have to state my opinion that *Anthony Bacon* was not in the lawful custody of the plaintiffs in error, either when the officer took him

at the suit of Arambura, or when the plaintiffs in error afterwards brought him in custody before Coltman, J.

I have found it impossible to regard the facts of this case otherwise than as falling within the rule of law laid down and acted on in *Barratt v. Price*, and therefore in my judgment the answer to these two questions of your Lordship must depend entirely on the inquiry, whether that case ought to be overruled; and I am of opinion that it ought not.

The rule there laid down is, that though, generally speaking, when the sheriff arrests the defendant in one action it operates virtually as an arrest in all the actions in which the sheriff holds writs against him at the time, yet where the sheriff has, by his own act, illegally arrested the defendant, such an arrest, being a false imprisonment, cannot operate as an arrest under any writs lodged with the sheriff. In other words, if the sheriff has wrongfully imprisoned the defendant in one suit, he shall not make such custody a means of taking him or detaining him in any other.

The authority of this case, which was decided after full consideration, was afterwards recognised by all the three Courts of Westminster Hall, in *Pearson v. Yewens*, *Robinson v. Yewens*, and *Collins v. Yewens*. It is true, as to these cases, that the Court of Exchequer differed from the two other Courts on the construction which ought to be put upon the facts brought before them; but the Courts were unanimous in regarding *Barratt v. Price* as having established the true rule to be applied to the facts when ascertained. In the subsequent case of *Barrack v. Newton*, the doctrine of *Barratt v. Price* was distinctly recognised as an established rule of law by every member of the Court; and it should be added, that in none of these cases was the soundness of that doctrine in any degree disputed or doubted either at the bar or on the bench. On the contrary, in *Robinson v. Yewens*, Parke, B., speaks of "the very proper and reasonable distinction introduced by *Barratt v. Price*."

A case thus deliberately decided, and thus fully recognised and acted on, it would surely be mischievous to overrule, unless it can be shown to have been founded on some wrong or unjust or hurtful principle, or that it is inconsistent with some better authority.

The principle of the rule may perhaps be stated to be, that if a first arrest be a false imprisonment by the wrongful act of the sheriff himself, no subsequent conduct or act of his can legalize the continuance by him of that imprisonment. It has been argued that such a doctrine is unjust both to the sheriff and to the plaintiffs in the other actions, who have lodged writs of execution in his hands and thereby gained a right to have the body of their debtor arrested.

As to the sheriff, it must be borne in mind that the rule is only applicable when, as in the present case, the bailiff who makes the illegal arrest acts under such circumstances that his conduct can be considered as the conduct of the sheriff, and his custody as the custody of the sheriff himself. This can rarely happen; but when it does, why should it be deemed unjust that the sheriff should not be allowed to take advantage of his own misconduct for his own purposes? If the sheriff of Surrey, having writs of *ca. sa.* against a defendant, and being desirous of taking him, but unable to do so because he is living in Kent, goes out of his own bailiwick into the latter county, and lawlessly makes the arrest there, and then brings his prisoner into Surrey, is it unjust to

him that the law says, "You shall not continue the custody of the prisoner you wrongfully took, and entitle yourself or your bailiffs to fees, whatever writs you may have which authorize you to arrest or detain him in the county into which you have illegally brought him?" The inducement to sheriffs' officers to arrest unlawfully for the purposes of earning their fees by detaining on other writs has been much diminished since the poundage on writs of *ca. sa.* was abolished by the statute 5 & 6 Vict. c. 98. But that circumstance affords no good reason for overruling the established doctrines of law as to the consequences of such illegality.

With respect to the other execution-creditors, if the sheriff has not had it in his power legally to arrest the debtor, they have no just ground of complaint. If he has had it in his power, and has negligently disabled himself by means of his illegal arrest, then the execution-creditors have a remedy against the sheriff, and will probably be no losers by substituting his liability for that of their debtor. And it may be observed that the sheriff can, in every case, by his misconduct or negligence, at the peril of his own responsibility, annihilate the right of the execution-creditors to take the body of the debtor, by refusing or neglecting to act on the writs of execution.

The rule laid down in *Barratt v. Price*, it may be remarked, in no way interferes with the doctrine that the sheriff may (and indeed must, at his peril, if he has an opportunity) execute a *ca. sa.* on the body of the debtor, although he may be already in illegal custody, and although the illegal custody be the means of enabling the arrest, provided it has not been brought about by the illegal act of the sheriff himself.

Nor does it interfere with the doctrine that a man acting under legal authority is not confined in his justification to the authority under which he has professed to act at the time when he acted, but may resort to any other authority which justified his proceeding. For instance, in the present case, if the officer of the plaintiffs in error had been armed with a warrant on the writ at the suit of the defendants in error at the time he took *A. Bacon*, the plaintiffs in error might well have pleaded that writ in justification, if *Bacon* had sued them for arresting him, notwithstanding their officer professed at the time to be acting on *Arambur's* writ. But if such an action had been brought and such a plea pleaded, it would have been a good replication to plead (as the fact really was) that they had arrested him by the hands of a bailiff who had no warrant on the writ at the suit of the defendants in error. It was only to prove the validity of such a replication and the illegality of an arrest by a bailiff without a proper warrant, that *The Countess of Rutland's case* was cited in *Lord Truro's* judgment in the present case in the *Exchequer Chamber*, though, owing probably to the abruptness with which it is there mentioned, it has been sometimes regarded as if it were cited generally in support of the doctrine in *Barratt v. Price*.

As to the authorities supposed to conflict with that doctrine, the case mainly relied on has been *Thurland's case*. There, certainly, the illegal arrest was the sheriff's own act. He afterwards procured a *ca. sa.* to warrant it, and brought the prisoner into court, having returned *cepi corpus* to the writ; and the Court fined the sheriff for his misconduct, but committed the prisoner to the Fleet (there to remain until, &c.), because the plaintiff was innocent. It was observed on this case, in the

argument before this House, that the sheriff appears by the report, according to the practice of that day, to have actually brought the body into court pursuant to the exigency of the writ, and there finally relinquished the custody. But a further observation may be made, viz., that the Court expressed the opinion that a writ of false imprisonment lay against the sheriff, in which the defendant should recover damages *as well for the last arrest and continuance of the imprisonment as the first*; that is, the Court was of opinion that the delivery of the *ca. sa.* to the sheriff did not legalize the subsequent continuance of the custody by him: an opinion quite consistent with the doctrine of *Barratt v. Price*, and wholly inconsistent with the arguments on which it is sought to overrule that case.

As to the third question of your Lordships, I am of opinion that there was evidence for the jury that the plaintiffs in error were guilty of a breach of duty towards the defendants in error in arresting Bacon under Arambura's writ. On this point I need only say that I continue to concur entirely in the view taken in the judgment delivered by Lord Truro, in the Court of Exchequer Chamber, as reported in 10 Q. B. Rep.

As to your Lordships' fourth question, I am of opinion that there ought to have been an entry in the judgment discharging the plaintiffs in error without day, as to so much of the breach on the plea of not guilty as was found for the plaintiffs in error. But this omission may, I apprehend, be set right by your Lordships without reversing the judgment.

As to your Lordships' fifth question, I am of opinion that there is no inconsistency in the finding of the jury on the plea of not guilty, and on the seventh plea. The finding that the plaintiffs in error took and imprisoned Bacon "under a false and illegal pretence of the writ," &c., is not inconsistent with the fact that they were "not guilty" of doing so "wrongfully." As to this also, I beg to refer your Lordships to the judgment of Lord Truro, and the observations there made—10 Q. B. Rep. 562—as to the meaning of the word "wrongfully" in the second breach.

CROMPTON, J.—My Lords, I think that the rule of law laid down by the Court of Common Pleas in the year 1833 in the case of *Barratt v. Price*, and distinctly recognised and approved by all the superior Courts of common law in 1839, ought not now to be disturbed.

According to those decisions an arrest which is illegal by the wrongful act of the sheriff does not operate as an arrest under, nor can the party be detained under, another writ lying in the sheriff's office at the time of the illegal arrest.

In the present case the first arrest was under the sheriff's warrant founded on no writ, and was an utterly illegal and unjustifiable trespass in point of law on the part of the sheriff; and I think the rule that prevents such an illegal act from operating as an arrest by reason of there being a writ in the sheriff's office is wise and reasonable, and tends to prevent collusion and abuse. In the words of Mr. Baron Parke, in *Robinson v. Yewens*, it is a "very proper and reasonable distinction that the first arrest must not have been illegal by the wrongful act of the plaintiff." I have heard nothing to make me think that this rule of law is either inconsistent with, or unsupported by, previous authorities. In several of the cases on this subject there has been a difficulty in ascer-

taining how far the sheriff originally was or could by his subsequent conduct be treated as a party to the first wrongful arrest. This difficulty in the application of the rule appears to me to show the more strongly the recognition of the principle. Here there can be no doubt as to the illegal trespass being the sheriff's own wrongful act, as it was committed under his warrant to do the very act by virtue of the void writ.

I think, therefore, that when the sheriff's officer took Bacon into custody at the suit of Arambura he was not in lawful custody at the suit of the defendants in error.

Neither do I think that Bacon was in the lawful custody of the sheriff at the suit of the defendants in error by reason of anything that passed before Coltman, J. In *Barratt v. Price* and the cases in 1839, the sheriff claimed to hold the prisoner at the suit of the parties having lodged writs in the office; but such detainer was held illegal where the first arrest was considered to have been the mere illegal act of the sheriff.

I should observe that I do not find in the evidence set out on the record that Bacon was brought personally before the Judge at chambers. What is stated is, that on the hearing of the summons, Mr. Burchell, the under-sheriff, objected that Bacon ought to be detained in the sheriff's custody under the writ of the defendants in error. Even if, as seems to have been supposed, Bacon had been brought before Coltman, J., by the under-sheriff, I should not have thought him in the lawful custody of the sheriff under the circumstances.

I answer your Lordships' first and second questions in the negative.

In answer to your Lordships' third question, I think that there was some evidence of negligence as against the defendants below in not arresting Bacon at the suit of the defendants in error. Attending, as your Lordships desire us to do, to the pleadings and the evidence, I understand the third question to inquire whether there was any evidence of negligence under the first breach for non-arresting by reason of the plaintiffs in error having arrested Bacon under the void writ so as to prevent any arrest or detainer at the suit of the defendants in error. I think that this matter is properly explained by Lord Truro, in delivering the judgment in the Exchequer Chamber, where he points out the mode of leaving this question of negligence to the jury; though I am not satisfied that I should have agreed with the jury in finding that the negligence was established. This, however, could only be ground for a new trial, as in a verdict against evidence. And, thinking that there was some evidence, I answer the third question in the affirmative.

As to the fourth question, the judgment appears to me clearly erroneous, by reason of judgment not being entered up for the defendants on the part of the issue found for them. But this appears to me to be of little consequence, as I presume that your Lordships will (as you clearly are at liberty to do) correct the judgment by ordering judgment on the part of the record in question to be entered in the proper form for the defendants.

As to the last question, I answer that there is no inconsistency in finding the general issue on the whole of the second breach for the defendants below, and finding the particular issue as to the fact of the arrest under the void writ for the plaintiffs below.

The Exchequer Chamber having thrown out, in the case as reported in 10 Q. B. Rep., that it might be doubtful whether the second breach

was free from objection, it was wise and right in the plaintiff, succeeding on the first breach, to allow the verdict to pass for the defendants on the second; and it was the more proper course that the plaintiffs should not recover damages in the two breaches for the same negligence. It is therefore found with respect to the second breach, that the defendant was not guilty of arresting Bacon under an illegal writ, so that the plaintiff lost thereby the opportunity of having him taken under the good writ. The plea and verdict in the general issue as to this second breach negatives, as regards that breach, the whole cause of action made up of the negligence and its consequences. The arresting Bacon under the illegal writ, however negligent, would not in itself give a right of action to the plaintiffs below; but it is only that negligent arrest, when coupled with or followed by the other circumstances as consequences of such arrest, that can be supposed to give a right of action. Then the verdict on the seventh plea, finding that the allegation in the first part of the second breach as to the arrest of Bacon under the void writ was true, cannot be inconsistent (looking at the verdict and the other parts of the record only) with a finding for the defendant on the general issue to the whole of the second breach, denying in effect the whole cause of action under the second breach, compounded of the negligent arrest under the void writ, and the consequent non-arrest under the plaintiffs' writ.

I answer your Lordships' last question, therefore, by saying that, in my opinion, there is no inconsistency in the findings of the jury referred to in that question.

CRESSWELL, J.—In order to answer the first question proposed by your Lordships, it is necessary to consider what was the effect (if any) of the caption said to have been made at the suit of Arambura. No writ issued at his suit—the instrument taken to the sheriff's office was not a writ—it gave the sheriff no authority to grant a warrant to take the person of Bacon, and he ought to have known that. The sheriff, therefore, in granting that warrant acted of his own wrong, and the warrant gave no legal authority to the bailiff. The caption was just as illegal as if the sheriff, without having received any document or instructions whatever, had ordered an officer to take him. At that time Bacon was certainly unlawfully imprisoned. There is no authority for saying that, on such illegal caption being effected, he was immediately in lawful custody under the valid *ca. sa.* issued at the suit of Lane. When there are several valid writs in the sheriff's hands against the same person, the sheriff may take the party under any one, and by so doing he in effect takes him under all, for all immediately operate as detainers; but unless he takes him under one he certainly cannot be said to take him under all. Here the officer did not take him under any writ. How then can it be said that he took him under the writ at the suit of Lane? I am of opinion that it cannot be so held either on principle or authority.

Upon the second question. Although not in lawful custody immediately on being taken, was he in lawful custody at the suit of Lane when brought before Coltman, J.? In answering this question I will assume that the case is the same as if the sheriff had actually claimed to take him under this writ when in his custody. The original taking was undoubtedly unlawful, being without any writ or warrant granted upon a writ. The supposed second caption or actual detention after-

wards, by virtue of Lane's writ, must therefore be subject to the same considerations, whether that writ was lodged with the sheriff before or after the original taking.

Now, in *Barrack v. Newton*, Patteson, J., says, "If a man is taken on the only writ in the sheriff's office, and that writ is bad, detainers lodged afterwards are also bad." But the original taking being without any writ must be at least as illegal as under a bad writ, and therefore the subsequent detainer under Lane's writ must, according to Mr. Justice Patteson's rule, be bad also.

But this point was determined long before the case of *Barrack v. Newton*, by the Court of Exchequer, in *Barlow v. Hall*, and by Lord Eldon, in *Ex parte Ross*. Ross, a bankrupt, during his attendance at a meeting of the Commissioners to pass his examination, was arrested, and several other writs were lodged in the Secondary's office, some before and some after the arrest. Upon a petition for his discharge being discussed, Lord Eldon said—"It has been repeatedly determined that if the arrest is bad all the other writs are rendered inoperative as detainers, nor can there be any difference whether such writs were lodged before or after the arrest. It is the arrest alone that gives efficacy to the detainers, and if it be illegal it can give effect to nothing." It has been supposed that the case of *Ex parte Ross* and some others of the same kind might be explained and disposed of by the consideration that they were founded on the privilege of the party arrested, which would equally protect him against all writs in the sheriff's office at the time. But that observation would not apply to writs lodged after the caption, and the writ now under consideration must be for this purpose considered as lodged after the taking. If the plaintiffs in error rely on its having been issued and lodged before, that can only be to take advantage of the original taking, which has been already disposed of, and which, for the purpose of this question, is assumed to be such that it would not give effect to other writs in the sheriff's office.

Barratt v. Price is another direct authority on this point. Nor can I find any decision that where a party has been arrested by a sheriff acting illegally, his detention by virtue of another writ in the sheriff's office can be justified.

In *Robinson v. Yewens*, Parke, B., says, "The old rule was, that if the sheriff had several writs against the same party and arrested him on one of them, he was to be considered as in custody on all. The case of *Barratt v. Price* introduced this very proper and reasonable distinction, that in order that that consequence should follow, the first arrest must not have been illegal by the wrongful act of the sheriff." He therefore, as did the rest of the Court of Exchequer, recognised the soundness of the decision in *Barratt v. Price*, although he considered that it had introduced a distinction. I doubt whether that very learned person was correct in ascribing to the Court of Common Pleas the introduction of any new doctrine. It seems to me that the rule upon which the Court acted in *Robinson v. Yewens*, *Barrack v. Newton*, and in *Egginton's* case, viz., that where a first arrest could not be sustained by reason of some irregularity in the writ or misconduct in some person not affecting the sheriff, the party arrested might be well detained or taken under another writ to which the objection did not apply, was rather an exception out of the generality of the rule laid down in the cases of

Barlow v. Hall and Ex parte Ross. From the first of those decisions until the present case arose, the doctrine there laid down has never been questioned by the Courts in Westminster Hall; and I think we ought not now to depart from it, unless it can be shown that it violated some legal principle. The only principle that can be said to have been violated is, that the plaintiffs below had a right to have their writ executed against Bacon, and that the sheriff could not deprive them of that right by taking Bacon wrongfully. The argument is plausible, but founded on a fallacy as to the right of Lane. His right was to have Bacon taken according to law, not contrary to law. If the sheriff could have executed the writ according to law, and he neglected to do so, the remedy is against the sheriff; Lane had no right to obtain compensation for the sheriff's neglect, by having Bacon taken and detained contrary to law. But then it is said that although the sheriff may have acted illegally in taking Bacon, who may sue him for the wrong, the plaintiffs below under whose writ of *ca. sa.* he was detained, were entitled to have him so detained, applying to writs of execution against the person that which appears to have been said by Littleton and others as to writs of *fi. fa.* in the Year-Book, 18 Edw. 4, Pasch. 4,—“That the sheriff cannot break the defendant's house by force of a *fi. fa.*, but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good.” There are other dicta in the books to the same effect; but I do not find that it has ever been solemnly decided, and I cannot but consider that it is still an open question, and, at all events, it has never been extended to process against the person since the decision of Thurland's case, and it is directly at variance with all the modern decisions that have been referred to. For these reasons, it seems to me that when the plaintiffs in error brought Bacon before Coltman, J., he was not in their lawful custody at the suit of the defendants in error.

Upon the third question, I am of opinion that the plaintiffs in error were guilty of a breach of duty towards the defendants in error in not arresting Bacon under his writ. If they had arrested him in the first instance, under that writ, they would not have been guilty of any breach of duty by claiming to take him at the suit of Arambura also; by taking him at the suit of Arambura, and not under Lane's writ, the plaintiffs in error were guilty of a breach of duty, for the sheriff (had due care been taken) must have known that the pretended writ at the suit of Arambura was a nullity. Every suitor who lodges a writ with the sheriff has a right to have it duly and legally executed. If the sheriff has several writs, he effectually executes all by a caption, legally made under one. But if he negligently makes an unlawful caption, not under any one of those writs, he is guilty of a breach of duty towards each party whose writ remains unexecuted, for the very caption complained of shows that the sheriff had information which would have enabled him to make a legal caption, and so to have executed Lane's writ.

Upon the other questions proposed by your Lordships, I concur with the opinions already expressed by my Brethren.

WIGHTMAN, J.—My Lords, it appears in this case, that the plaintiffs in error, holding the office of sheriff of Middlesex, had in their hands as sheriff, for the purpose of execution, a writ of *ca. sa.* at the suit of the defendants in error, against one A. Bacon, without any indication of his place of abode, or any information as to where he was likely to

be found. Whilst this writ was in the hands of the sheriff unexecuted for want of necessary information, a writ of *capias* to hold Bacon to bail in an action in the Court of Exchequer, at the suit of one Arambura, was delivered to the sheriff to be executed. In this process at the suit of Arambura Bacon's place of abode was mentioned, and a warrant was made out upon it, and Bacon was found at the place indicated, and taken into custody by the sheriff's officer. At this time, the writ of *ca. sa.* at the suit of the defendants in error was in the hands of the sheriff, but no warrant had been granted by the sheriff under it.

The writ at the suit of Arambura was in the form prescribed by the Act of Parliament, and appeared in all respects regular upon the face of it, except that it had not the signature of the signer of writs of the Court of Exchequer, though it had the seal of that Court upon it. It appears that by the practice of the Court of Exchequer, writs of *ca. sa.* and *fi. fa.* do not require the signature of the signer of writs, and that the writ of *capias* to hold to bail is the only writ from that Court which does require it.

Assuming, as seems to have been assumed in the court below, and upon the argument before your Lordships, that the omission of the signature of the clerk was not merely an irregularity, but such a defect as made it bad upon the face of it, will the arrest under that bad writ be available as an arrest under the good writ at the suit of the defendants in error, which the sheriff had in his hand at the time to be executed? The general rule of law is, that if a sheriff has several writs against the same person and arrests him on one, he is to be considered as arrested and in custody on all. In *Barrack v. Newton*, Patteson, J., says, "If a man is taken on the only writ in the sheriff's office, and that is bad, detainers lodged afterwards are also bad. But if there be fifty writs in the office, and the sheriff arrests on one, the supposition of law is, that he arrests on all at once, and if one be bad, the rest are not vitiated, unless the sheriff himself has been guilty of some misconduct." In *Robinson v. Yewens Parke*, B., admitting the general rule, observes, "That the case of *Barratt v. Price* introduced a very reasonable and proper distinction, that the first arrest must not have been illegal by the wrongful act of the sheriff."

Both these very learned Judges appear to have been of opinion that the general rule obtains, unless the first arrest is rendered illegal by some misconduct or wrongful act of the sheriff himself. In *Barratt v. Price*, which it is said introduced the distinction, the defendant was ordered to be discharged from a detainer, on the ground that the arrest, which was made in another action, was fraudulent on the part of the sheriff's officer. Tindal, C. J., in giving the judgment of the Court in that case, observes, after stating the general rule, that "a detainer will hold good though the Court may, upon collateral grounds, unconnected with the act of the sheriff, order the party to be discharged from the first arrest; but where the sheriff has by his own act illegally arrested the defendant, the defendant is not in custody under the first writ."

In all these cases it seems to have been considered necessary in order to take a case out of the general rule, that there must have been some misconduct on the part of the sheriff which rendered the first arrest illegal on that ground. The first arrest being illegal by reason of some

defect collateral to the act of the sheriff himself, will not prevent the operation of the general rule.

If that be so, how stands the present case? Was the arrest under Arambura's writ illegal, by some collusion, fraud, or misconduct of the sheriff himself, or of his officer, which is the same thing? The illegality was, by reason of the omission of the signature of the signer of writs, with which breach of regularity the sheriff had nothing to do; but it may be, that if he knew of the defect, but nevertheless thought fit to act upon process which he knew to be bad, the arrest would be inoperative as an arrest under the other writs, by reason of the sheriff's own personal default. There was no evidence whatever, that the sheriff or his officer knew of the defect,—and it may then be asked, as it has been, whether it is a defect which the sheriff ought to have known, and therefore, whether he was not guilty of misconduct, in acting upon a writ which he ought to have known was bad.

If Arambura's writ had not been in the form prescribed in the Act of Parliament, that might have been a defect, which it would have been a default in the sheriff not to have noticed, as the form of the writ would have been in violation of the general law of the land. But how or why is the sheriff to know that the Court of Exchequer requires a particular form to be observed, with respect to writs of *capias* to hold to bail, which it does not require for other writs, and which is not required by the statute which gives it? The sheriff may have had many writs of *ca. sa.* and *fi. fa.* from the Court of Exchequer to execute, all having upon them the seal of the Court, but none having the signature of any officer of the Court; and how is he to know that a *capias* to hold to bail from that Court, which has the seal of the Court upon it, and which is in the form prescribed by the Act, is bad, because it has not upon it a signature, which he never saw upon any other writ issuing from that Court? But it is said that he might, by using reasonable care and diligence, have discovered the defect. What was the care and diligence that he ought to have used, and which might have enabled him to discover an error, of which he was otherwise wholly unaware, I am at a loss to know.

The writ, at the suit of Arambura, being bad from a defect in the writ itself, would afford no ground of defence to the sheriff in an action at the suit of Bacon, who would be entitled to be discharged from custody under that writ; but as the discharge would be upon grounds collateral to any breach of duty by the sheriff himself, if, as I think was the case, he was not guilty of any negligence or default; it appears to me that Bacon was in the lawful custody of the sheriff, under the writ of the defendants in error, upon the authority of the cases to which I have referred. And I therefore answer the first question proposed by your Lordships in the affirmative:—That Bacon was in the lawful custody of the sheriff, under the valid writ at the suit of the defendants in error, which was in the sheriff's hand when Bacon was arrested upon the invalid writs at the suit of Arambura.

If, however, Bacon was not in the lawful custody of the sheriff under the valid writ when he was arrested at the suit of Arambura, I am of opinion, upon the authority of the cases to which I have referred, that he was not in their lawful custody when brought before Coltman, J.; and I therefore answer your Lordships' second question in the negative.

I do not find any evidence for the jury, that the sheriff was guilty of a breach of duty towards the defendants in error, in arresting Bacon under Arambura's writ; there was no evidence that the sheriff or his officers knew of the defect in Arambura's writ; nor do I think there was any negligence in not finding it out, for the reasons I have already mentioned. And I therefore answer your Lordships' third question in the negative.

With respect to the fourth question proposed by your Lordships, it appears to me, that the omission of an entry that the plaintiffs in error go without day, as to so much of the matter charged against them as was found for them on the plea of not guilty, being only form, and amendable by the Statutes of Jeofails, as the misprision of the clerk, is no ground of error. That it is amendable as a clerical error appears from the case of *Everard v. Bosville*, cited in *Ellison v. Ellison*, Sir T. Raym. 30. The fourth question proposed by your Lordships I therefore answer in the negative.

The last question proposed by your Lordships is one of some difficulty.

The declaration contains two breaches. The first, that the sheriff did not, nor would, during a long space of time, to wit, three weeks after the *ca. sa.*, at the suit of the defendants in error, had been delivered to them, and although a reasonable time for that purpose had elapsed, take Bacon under that *ca. sa.*, though he was during all that time within the bailiwick. And the second breach is, that the sheriff afterwards, and at the end of the said space of time, did not take Bacon under the *ca. sa.*, but took him under the false pretence of another writ.

The jury have found that the sheriff was guilty of the first breach, but not guilty of the second; and they have also found on the seventh issue joined upon the matters alleged in the second breach, that the sheriff did take Bacon under the false pretence of the other writ, as alleged.

The damages are only assessed upon the first breach, and the inconsistency in the findings upon the second may not be very material, as the defendants in error claim nothing now under the second breach, and rest their case upon the first breach, the finding upon which, looking at the pleadings and the record, apart from the bill of exceptions, is perfectly consistent with the finding of not guilty upon the second breach.

But if the whole record, including the bill of exceptions, and the evidence and matters therein stated, are considered, the finding the sheriff guilty upon the first breach, and not guilty upon the second, does appear to raise an inconsistency which may render a venire de novo necessary.

The first breach might have been supported by evidence which showed that the sheriff might have arrested Bacon under the *ca. sa.* of the defendants in error without any reference to the writ of Arambura or before the sheriff arrested Bacon under that writ; but there is no evidence of any breach of duty, except that which is alleged to have occurred in arresting Bacon under Arambura's writ, which is the default charged in effect in the second breach, which is for arresting Bacon under the false pretence of another writ (Arambura's), which had no existence in reality, whereby the sheriff was unable to take or detain him under the writ of the defendants in error, and was obliged to let

him depart from their custody. All this, which is alleged in the second breach, is negatived by the finding of the jury upon the plea of not guilty to the second breach; and it is difficult to reconcile that finding with the case of the defendants in error as it appears upon the record, including the bill of exceptions, and with their case as it was argued before your Lordships. Whether that finding was really intended, or was entered as it is by mistake, I know not; but I should suspect the latter, as it seems quite inconsistent with the finding upon the seventh issue, and as it seems to me hardly consistent under all the circumstances of the case with the finding upon the first breach. I am therefore upon the whole disposed to think, that upon that ground there ought to be a *venire de novo*.

ERLE, J.—I beg to take your Lordships' first and second questions together, and to answer them in the affirmative, in this sense:—Bacon was in lawful custody at the suit of Lane as soon as the sheriff, having him in actual custody, knew that Lane's writ related to him.

The facts relating to this point are—a *capias* at the suit of Lane against one Anthony Bacon, without address or description, was handed over by the late sheriff to the defendants below, the succeeding sheriff, and was lying in the office. Afterwards a *capias* at the suit of Arambura against Anthony Bacon, with description and address, was lodged with them, and by a warrant thereon Bacon was arrested, and on search at the sheriff's office, Lane's writ was found, and Bacon was identified as the defendant in that suit, and he was then detained thereon.

The writ at the suit of Arambura being void, both *ex facie* and in substance, Bacon was on summons ordered to be discharged from custody thereon.

Then the sheriff claimed to keep him in custody under Lane's writ, but he was, on summons, again ordered to be discharged, which was done.

On proof of these facts at the trial, the Judge ruled that the sheriff had not arrested Bacon at the suit of Lane, that is, that Bacon was not in lawful custody at the suit of Lane, and upon exceptions thereto the questions above mentioned have arisen.

My answer in the affirmative is *prima facie* proved by showing that the sheriff had Bacon in actual custody, and had a *capias* against him at Lane's suit, and knew that it applied to Bacon. The defendants in error contend that if the actual custody began with an arrest in one suit, which was a trespass by the sheriff, such trespass renders unlawful all arrests and detainers of the same defendant under other writs at the suit of other plaintiffs, until he shall have been set entirely free by the sheriff and arrested again.

For this the case of *Barratt v. Price* is the authority. My reply to this contention is, first, that *Barratt v. Price* was an erroneous decision, and ought to be overruled; and secondly, if that should not be so held, then the present case is distinguished therefrom, and ought to be decided for the sheriff, notwithstanding that case.

In submitting that *Barratt v. Price* was erroneous, I propose to state the material facts of that case, and to consider the grounds of that judgment. The facts were, the sheriff, having writs of *capias* in two suits, *Barratt v. Price* and *Nokes v. Price* (I use the name of Nokes as no name was given in the report), granted a warrant to a bailiff in Nokes

v. Price; a stranger, without previous collusion with any one, imprisoned Price by trespass, in order that this bailiff might arrest him, and he did so. This arrest, which appears to be valid, was held by a Judge to be a trespass by reason of subsequent misconduct between the bailiff and the stranger, and he accordingly made an order for the discharge of Price in *Nokes v. Price*, which was done—and the sheriff, then having Price in actual custody, and having Barratt's writ, claimed to detain him in *Barratt v. Price*, but the Court ordered that he should be discharged.

The reasoning in the judgment is, that the illegal act of the bailiff in *Nokes v. Price* was the act of the sheriff; that as a lawful arrest in one action operates virtually as an arrest under all writs held by the sheriff against the same defendant (for it would be an idle ceremony to arrest in each, i. e. *actum agere*), so an unlawful arrest in one action being a false imprisonment by the sheriff, and no arrest in that action, does not operate as an arrest in any other action, and *therefore* the sheriff, after such an unlawful arrest, cannot arrest or detain in any other action till the defendant has been set free from the unlawful arrest, and has been found again and arrested lawfully.

I submit that each of the three propositions preceding the conclusion, though true in one sense, is untrue in the sense intended by the Court; that the conclusion does not follow from these propositions in whatever sense they are taken; and that the rule laid down in this case for the first time is inconsistent with sound principles relating to arrest by the sheriff.

Before examining the judgment in detail it is worth while to consider the wider question—When does an unlawful arrest render a custody unlawful which would otherwise be lawful?—and the principles which have been settled, and ought to govern in answering this question. If we suppose that to a *habeas corpus* there is a return of custody under a writ, and a reply of an unlawful arrest, this reply may show unlawfulness either in respect of the writ being void or of a trespass in the execution of it; and in the case of a trespass in the execution of it, the reply may be of a trespass by a stranger, or by the plaintiff, or by the bailiff, or by the sheriff. And this reply may be made to a return of custody under more writs than one, and those writs may be at the suit of the same or different plaintiffs.

Now, what are the principles that ought to govern in answering the question so raised, taking into account the rights and duties of the sheriff, and of the defendants, and of the several plaintiffs, one of whom may be a party to a wrong, and another no party thereto? It would be reasonable that the wrongdoer should make compensation for his wrong, and should take no advantage to himself therefrom; that the sufferer of the wrong should be entitled to compensation from the wrongdoer, and then be amenable to the law in respect of the rights of others against himself, to the same extent as if he had suffered no wrong; that the rights of plaintiffs who did not participate in the wrong should not be affected thereby; that as the sheriff is the distinct and separate agent of each party from whom he holds a writ, and the bailiff the distinct and separate agent of each party for whom he holds a warrant, if the sheriff and bailiff in their agency for one of the parties commit a wrong they must compensate the sufferer, and the plaintiff, their prin-

cial in that matter, can take no advantage therefrom; but other plaintiffs for whom they were neither directly nor indirectly acting in committing the wrong should not take detriment, nor be deprived of any right thereby. I submit that all the decided cases before *Barratt v. Price* are in accordance with these principles, that case having first decided that the defendant arrested by trespass of a bailiff is entitled not only to compensation and to his discharge in the suit in which the trespass was committed, but also his discharge in all other suits by other plaintiffs whose writs have been or should be in the hands of the sheriff before he should have been set free, and that thus the rights of plaintiffs not participant in the wrong should be suspended; and that the sheriff should be incapacitated as to their writs by reason of a trespass of a bailiff acting for a party, a stranger to them.

The class of cases that I would first refer to in support of this view of the law, are those relating to false imprisonment by a stranger to the suit, and I would beg to draw particular attention to that portion of them relating to false imprisonments for the purpose of procuring a lawful arrest thereby.

If the reply to a return of custody under a writ shows that the custody began during an imprisonment by trespass, it does not thereby show that the custody is unlawful. To produce that effect it must go on to show that the plaintiff or the sheriff participated in the trespass. If this is not made out it matters not that the imprisonment was effected for the purpose of procuring the arrest, and that the bailiff knew of the false imprisonment when he went to execute the writ, and was enabled to execute it by reason of the trespass. Indeed, as the sheriff in one sense must arrest when he may, if he was informed of a false imprisonment, and did not take advantage of it to effect a caption, he would be liable to an action at the suit of the plaintiff for the omission.

Thus, where, after judgment, and before *capias* issued, a friend (called in the report an agent) of the plaintiff and the sheriff (probably a sworn bailiff) imprisoned the defendant by trespass for the purpose of arresting him under the judgment, and then procured a *capias*, and arrested him under it; it was held, after great consideration, to be lawful custody.

The plaintiff was found clear of all participation in the wrong. The sheriff, as his agent, after the writ issued only did his duty in taking the defendant under the writ, and although he and the friend of the plaintiff trespassed, yet this was trespass by strangers to the action, to the writ, and to the plaintiff, and had no operation upon the plaintiff's right under the writ; and although the defendant was wronged, his compensation was to be made by the wrongdoers, and not at the cost of the plaintiff, who was clear of wrong: *Thurland's Case*.

I submit that the Judges who decided this case laid down the principles for discriminating whether custody is made lawful or unlawful in respect of a preceding trespass, with masterly precision and perspicacity.

So where Herne, a stranger, imprisoned by trespass, intending to procure a lawful arrest at Howson's suit, and Howson's attorney hearing of it, sent for the bailiff, and so perhaps participated in the imprisonment till he came, and the bailiff bringing Howson's warrant, and also a writ in *Crowden v. Walker*, took Walker to prison; it was held lawful

custody in Crowden's suit, although Walker was taken out of imprisonment by trespass, and although the bailiff was informed of the trespass before he arrested. The custody as to Howson was held unlawful, but as no cause was shown, and there was no discussion, the ground is not stated; probably it was because the plaintiff by his attorney became a party to the trespass before the arrest: *Crowden v. Walker, Howson v. Walker*.

So, where Slowman imprisoned by trespass, by taking Yewens to the lock-up house under a warrant of the late sheriff, at the suit of M'Claren, and then procured a valid warrant at the suit of Robinson, and held the defendant thereunder in the same lock-up, it was held to be lawful custody. For although Slowman, a sworn bailiff, trespassed in taking under the void warrant at the suit of M'Claren, still, both Robinson the plaintiff and the then sheriff were no parties to that imprisonment by trespass, and therefore did not affect the custody under Robinson's writ: *Robinson v. Yewens*. This case is worthy of particular attention, for it revised and, as I submit, corrected two decisions on the same arrest of Yewens by Slowman in the Queen's Bench and Common Pleas, to be hereafter mentioned.

The cases that follow are examples of lawful arrests during imprisonment by trespass, but where the imprisonment was not intended for the arrest; thus, where the defendant was arrested by trespass on a Sunday, at the suit of a corporation, and while in custody a ca. sa. was lodged by a plaintiff not participant in the trespass of the corporation, the custody at the suit of the plaintiff was held to be lawful, though it began in an unlawful custody at the suit of the corporation: *Eggington's Case*.

So, where the defendant was arrested under a writ void for irregularity, and was held in custody under that and under a subsequent valid writ for another party, it was held that the false imprisonment under the first writ did not make the custody under the second writ unlawful. The Court says false imprisonment does not make the custody beginning therewith unlawful, unless the sheriff or the plaintiff participate therein: *Ex parte Cogg*, 6 Dowl. 461.

Where the defendant was arrested by trespass on a Sunday, and arrested under a ca. sa. while so falsely imprisoned on Monday, it was held lawful custody, there being no collusion: *Jacobs v. Jacobs*, 3 Dowl. 675.

The second class of cases I would refer to in support of the principles above mentioned, are those where the plaintiff has been party to the trespass in the arrest. Whether the trespass is by wilful wrong, or by reason of the writ being void, not only is the custody in the suit in which the trespass was committed unlawful, but also if the same plaintiff has lodged another writ against the same defendant, the custody under that writ is also void. If the defendant has not been discharged from the custody begun by the plaintiff's trespass, the plaintiff is held to be a wrongdoer in creating the custody, and is therefore precluded from taking any advantage from his wrong; that is, he is required to restore to freedom, as far as he is concerned, the party whom he had imprisoned by wrong. Thus, where the plaintiff was a party to a false criminal charge and arrest on Sunday, for the purpose of arresting in a civil cause on Monday, the custody at his suit was illegal: *Wells v. Gurney*, 8 B. &

C. 769 (E. C. L. R. vol. 15). And where the plaintiff met the defendant, and by trespass forced him to his chambers and sent for the bailiff with a writ, the custody under that writ was illegal: *Birch v. Prodger*.

So, where the defendant was taken on an irregular attachment from Chancery, and attempted to be detained by a *capias utlagatum* at the suit of the same plaintiff, this was held to be an unlawful custody, as under the second writ the plaintiff was taking advantage of his own wrong: *Hall v. Hawkins*. So, where the defendants were arrested by trespass by revenue officers for breaches of revenue laws, and were detained under writs of *capias* for other breaches of revenue laws, it was held unlawful custody in each case, as being substantially at the suit of the same plaintiff, being a matter of revenue. The reason is not explicitly stated in each case, but they seem to stand on this ground: *The Attorney-General v. Carl Cass*, *The Attorney-General v. Golden*, 11 Price 345.

So, where a corporation committed for not giving up corporation books, and arrested by trespass, and afterwards lodged another warrant for not delivering up some other books belonging to the same body in another corporate capacity, held unlawful custody, the second warrant being substantially between the same parties as the first: *Eginton's Case*.

So, where the plaintiff imprisoned on Sunday and arrested on Monday: *Lyford v. Tyrrell*; and where the plaintiff arrested and then lodged the writ with the sheriff, the custody in each case was unlawful: *Barlow v. Hall*.

The third class of cases I would refer to in support of the same principles are those where the custody at the suit of one plaintiff under whose writ the arrest was made, is unlawful by reason of irregularity or other defect in a writ which is *ex facie* valid, and the defendant is detained under valid writs at the suit of other plaintiffs. Under these circumstances, the custody at the suit of the last-mentioned plaintiffs is lawful, though it originated in a custody which was a trespass.

For the trespass the plaintiff in default must compensate, and with that compensation the defendant is as amenable to the law in respect of other plaintiffs as if no wrong had been committed. On this point it is enough to cite the case of *Barrack v. Newton*, where it was fully considered and distinctly laid down.

This decision follows legitimately from the two principles before mentioned; the custody is unlawful as to the plaintiff, who being a trespasser cannot take advantage of his own wrong, lawful as to other plaintiffs, in respect of whose writs the false imprisonment of the defendant was no impediment, they not being parties to it. It is true the Court confines its judgment to a void writ, which is valid *ex facie*, so as to prevent the sheriff from being a wrongdoer; and the Court of Queen's Bench thus avoided a conflict with the decision of the Common Pleas in *Barratt v. Price*. But, except for that purpose, it is not easy to see the reason for holding in case of arrest by trespass at the suit of one plaintiff, that the custody of other plaintiffs is lawful, where the first plaintiff is alone liable for damages for the trespass, without the sheriff; but in case of arrest by trespass where the sheriff is either alone or jointly with the plaintiff liable for damages, there the custody at the suit of other plaintiffs is unlawful, it is not easy to see why the defendant's right of recourse

to the sheriff for damages should affect the lawfulness of the custody at the suit of plaintiffs unconnected with the trespass.

I would now come to the judgment in *Barratt v. Price*, and would beg to draw attention to the positions in it leading to the conclusion. The first is, that the act of the bailiff is the act of the sheriff. This is true if confined to the action in which the warrant to the bailiff is granted; untrue if it is extended to any other action. The trespass of the bailiff in *Nokes v. Price* was the trespass of the sheriff in that action, but no further; and I venture to submit that there was confusion leading to mistake, if the Court supposed that the illegal act of the bailiff in that action affected with illegality in any degree the act of the sheriff in *Barratt v. Price*. The sheriff is the agent of all the parties leaving writs to be executed; the bailiff is the agent of that party only in whose suit he receives a warrant, and the illegal act of the bailiff for *Nokes* affects *Nokes's* suit, but not *Barratt's*, and it is difficult to see why it affects the sheriff's rights and duties towards *Barratt*, more than it affects *Barratt* himself. The illegal act of the bailiff without authority from the sheriff is made the act of the sheriff, contrary to the general law of principal and agent, for the sake of securing a responsible recourse for indemnity in case of any wrong done in the execution of process. It is confined entirely to the act of the bailiff in executing process, and to civil responsibility in respect of that act; the reason for this responsibility of the sheriff, and the extent and limit of it, are stated in *Wood v. Finnis*, where the bailiff received the debt and costs from the defendant, and the sheriff was held not responsible, because this act was beyond the execution of the *capias*.

The limited sense in which the act of the bailiff is the act of the sheriff will further appear if the case of a special bailiff nominated by the plaintiff be supposed. In that case, as between the plaintiff and the sheriff, he is not the agent of the sheriff, but of the plaintiff alone, and the sheriff is not responsible for his act, but as between the defendant and the sheriff he is still the agent of the sheriff; in other words, the defendant has the same right here to treat the sheriff as his resort for damages as he would have in case of a sworn bailiff. If *Nokes* had nominated a special bailiff *Price* would have had a right to say that his act was the act of the sheriff, and it would be true as to *Price*, but not in any other sense.

The second proposition in the judgment is "that a lawful arrest under one writ operates as an arrest under all writs held by the sheriff against the same defendant, for it would be an idle ceremony, *actum agere*." This is true in the sense that after a caption under one writ changing freedom into imprisonment, no other caption is necessary to bring the party into custody under other writs. Caption or arrest, in the sense of changing freedom into imprisonment, cannot possibly be repeated till the imprisonment has been changed back into freedom again. But it is not true in the sense that an arrest under one writ operates by law as an arrest under any other writ. Still less is it true that it affects the powers of the sheriff in respect of other writs. If a bailiff with one warrant arrests, the custody is confined to that warrant. If he has several warrants the arrest is under all that he holds, and after the arrest, and before notice to the sheriff, the defendant is not in custody under other writs lying in the sheriff's hands. For instance, if he is

rescued from the bailiff immediately after the arrest, it seems that those plaintiffs only can sue the rescuers who had warrants in the bailiff's hands: *Hodges v. Marks*, Cro. Jac. 485. When the prisoner is brought into custody of the sheriff, he is immediately in custody under all the writs which are known by the sheriff to apply to him. He is in actual custody, and the sheriff has lawful cause and knows of it; and after search he is further in custody under all other writs which may be then found, and made out to apply to that defendant. It is an operation of fact, not of law. If there are several writs against the same name, it is a question of identity in respect of each writ, and as the identity is made out the custody attaches.

The third position of the judgment is, "That an unlawful arrest in one action being a false imprisonment by the sheriff, and no arrest in that action, does not operate as an arrest in any other action." This also, I submit, though true in one sense, is not true in the sense in which it was intended. The point for decision was the lawfulness of the custody in *Barratt's* suit. The position is, that the void arrest in *Nokes's* suit was no arrest, and therefore there was no arrest in *Barratt's* suit; and therefore the custody in *Barratt's* suit was unlawful. Unless it was intended in that sense, it was irrelevant. If it was so intended, it involved the notion that the lawfulness of custody in a suit is to be tested by reference to the lawfulness of an actual or virtual arrest in that suit; which I submit is a mistake. Lawful custody is created anew as often as a lawful cause of holding comes to a sheriff who has the party already in confinement. If he is confined in the lock-up house by trespass, and a *capias* reaches the sheriff, he is at once in custody, as is shown in *Thurland's Case*, and in *Robinson v. Yewens*. Here the writ has come to the defendant in the sheriff's prison, and if he is imprisoned by trespass in another place, the sheriff taking him with a writ to his own prison has him in lawful custody; and it is an error to test lawfulness of custody by lawfulness of arrest, if arrest means the act by which freedom is changed into imprisonment. This is shown both in the cases before cited and those which follow. Thus where a defendant was in custody of the sheriff on a charge of felony, and a *capias* was lodged: *Wood v. Burfit*, 2 M. & S. 238 (E. C. L. R. vol. 28). And where he was in custody under a revenue conviction, and a *capias* was lodged not intended for execution before removal by *habeas corpus*: *Owen v. Owen*, 2 B. & Ad. 805 (E. C. L. R. vol. 22). And where the defendant was in the lock-up house of a bailiff, and a *capias* was left which the bailiff refused to execute: *Wright's Case*, 5 Rep. 89. And where the defendant was in custody, and a *capias* was left to be returned non inventus: *Forsyth v. Marriott*, 1 N. R. 251. And where *capias* had been left to be returned non inventus, and defendant came to the office and claimed to be in custody to relieve his bail: *Magnay v. Monger*, 4 Q. B. 817 (E. C. L. R. vol. 45); S. C. 12 Law J. Rep. (N. S.) Q. B. 306. And where a discharge for a defendant from the plaintiff arrived at the prison on Saturday, and was sent to the under-sheriff, who returned it on Monday, and on Sunday another *capias* arrived: *Samuel v. Buller*, 1 Exch. 439;† S. C. 17 Law J. Rep. (N. S.) Exch. 54. And where a *capias* had been lodged and a discharge given by the plaintiff to the defendant, but without notice to the sheriff, and he arrested the defendant by this mistake, and found in his office a *capias* against the

defendant, with direction not to be executed unless in custody, though the custody was by mistake: *Arundel v. Chitty*. In all these cases it was held that a lawful custody was created. Whenever actual custody is combined with a lawful cause, it is lawful custody, unless one of the exceptions before mentioned applies. In many of these cases the custody is a duty cast on the sheriff against his will, and against the will of the party leaving the writ. Each custody is as separate and distinct from any other as if a prison wall was added or a separate chain for fastening up was left when a new writ arrived. I cite these cases to show that the reasoning is not legal if the Court supposed that the custody of Price at the suit of Barratt was unlawful, because the arrest by which he was taken from freedom to imprisonment in Nokes's suit was unlawful.

I submit that these three propositions, taking them to be reasoning for a final cause, that is, for adapting means to an end, lead to a conclusion the reverse of that pronounced by the Court. The judgment is, that as the act of the bailiff is the act of the sheriff, a lawful arrest of Price at the suit of Nokes by the bailiff would be a lawful arrest of Price at the suit of Barratt by the sheriff, for after one lawful arrest another would be an idle ceremony. But if the arrest at the suit of Nokes is unlawful and no arrest, an arrest at the suit of Barratt instead of being an idle ceremony would be an essential act, and the conclusion to be expected if sheriffs are instituted for the purpose, among other things, that judgments should be executed, would be that he should be directed to arrest at the suit of Barratt; but the Court decides the reverse, holding that he is, by reason of the need for arresting, incapacitated from arresting at the suit of any one. This reasoning is the only ground assigned for the judgment. It is not supported by any consideration of expediency or any principle of law, nor is it supported by a single authority. In *Lane v. Hooper*, Wilde, C. J., cites *The Countess of Rutland's Case* as supporting it. But it is utterly irrelevant. It was an information in the Star Chamber against the plaintiff and the serjeants-at-mace, i. e. the bailiffs, for a conspiracy to arrest by trespass, in breach of privilege of peerage. It appeared that the sheriff of London had a ca. sa. against the countess, and the bailiffs fearing she would be rescued from the sheriff, and thinking the power of the city safer, conspired with the plaintiff to levy a false plaint in the City Court, then the serjeants-at-mace arrested her thereon and took her to the Compter, the city gaol, and then the sheriff arrested her and took her to the county gaol, and she paid the debt and was released. After a hearing on this information it was held that the defendants should be punished. This is the whole; nothing is said of the sheriff, or of the lawfulness of his arrest, or of his returning the levy. Even if his custody had been held unlawful, on the ground that he had been a party to the conspiracy, it would have signified nothing to the matter now in hand; but the point is not adverted to further than that, as a general proposition, it is said a *capias* against a peeress would justify the sheriff in arresting, although as peeress she would be entitled to be discharged. This case is, therefore, no authority for *Barratt v. Price*.

In *Collins v. Yewens*, where Yewens was arrested by Slowman under a void warrant in one suit, and held by him under a valid warrant in another suit; and in *Pearson v. Yewens*, where the defendant after the

arrest by Slowman before mentioned was held under another warrant to another officer, each custody was held unlawful. The Court says that an imprisonment by trespass does not make an arrest unlawful, unless the sheriff or the plaintiff was a party to it. It also says that the arrest by Slowman was a trespass, not because the sheriff was a party to it beforehand, but because hearing of the imprisonment he issued a warrant in another suit to Slowman to arrest. The Court held that the custody in each suit was unlawful; and it seems to consider the danger lest a sworn bailiff might imprison by trespass without warrant, in order that a bailiff with a warrant might take into lawful custody, as some ground for the judgment. In *Pearson v. Yewens*, in respect of the same circumstances, the Court held the custody unlawful on the ground of implied collusion in the sheriff, by adopting the first trespass in making the warrant for the second arrest. But after both of these cases the lawfulness of the same custody under the same circumstances was affirmed in *Robinson v. Yewens*, on the ground that as Slowman imprisoned by trespass without collusion with the sheriff, therefore the custody of the sheriff under the second warrant granted to Slowman was lawful. If *Collins v. Yewens* and *Pearson v. Yewens* are cited as supporting *Barratt v. Price*, each Court probably in coming to the judgment was swayed by *Barratt v. Price*. But I submit that the judgment of each Court was revised by the Court of Exchequer in *Robinson v. Yewens*, and I submit that the judgments of those two Courts sanction a notion that the sheriff taking into custody a party imprisoned by trespass without previous collusion, may be found guilty of implied collusion *ex post facto* from adopting a trespass, and, in so doing, they sanction a mistake. For I submit, on the authorities before cited, that if a stranger, knowing that writs were out against a defendant, were to seize him and to bring him to the sheriff's office, the sheriff would be bound to take him into custody; and if Slowman had told the sheriff of his trespass upon Yewens, the sheriff would have been liable to an action by Robinson, if he had not immediately caused the writ to be executed. And if he had knowingly chosen Slowman for the purpose, according to *Thurland's Case*, he would have been justified in doing so. It may be observed in passing, that on this reasoning the original order of a Judge for a discharge of Price from the arrest at the suit of Nokes was a mistake, because the bailiff took him into lawful custody, though he was falsely imprisoned, and the subsequent misconduct of the bailiff could not make a lawful arrest unlawful.

In some cases *Barratt v. Price* has been cited with approval, but only for that part of the decision which is undisputed, and though it may have been acted upon in practice, I do not find any reported case in which that fact is stated, except as to Yewens in two courts, and as to Bacon in this case.

It was cited in *Egginton's Case*, who was imprisoned by trespass of the party, not of the sheriff, but the result of that case tends to confirm what appears to me to be the true principle of law, namely, that a custody under a writ is not unlawful by reason of a previous imprisonment by trespass, unless the sheriff in the execution of that writ was a party to the trespass.

Another class of cases has been referred to as supporting *Barratt v. Price*, which I submit are entirely irrelevant, viz., the cases of arrests

during a privilege. In these, the right to a discharge from the first arrest is a right to a discharge from all subsequent detainers, from the nature of the privilege, which is protection from all arrests. The party is privileged either for life as a peer, or during the session of parliament as a member, or *eundo, morando, and redeundo* as a suitor. In these cases the meaning of the privilege is an exemption from all custody during the privilege.

Thus where a bankrupt was arrested returning from examination, he was held to be privileged, and discharged from the suit in which the arrest was made, and from all other suits. The language of Lord Loughborough and Lord Eldon, declaring that an arrest in one suit is an arrest in all, and if the first arrest is unlawful all are unlawful, and a discharge in one is a discharge in all, must be understood with reference to the arrests unlawful on account of privilege, and to discharges from such arrests on account of privilege, which was the matter then in judgment before them: *Ex parte Hawkins, Ex parte Ross*.

So where Newton was arrested when privileged as a barrister, the discharge in the suit of the arrest was a ground for discharge in all suits in which writs had been lodged, from the nature of the privilege.

But the same defendant at another time, on another application, being discharged in the suit of arrest, for a defect in the writ, was held to be in lawful custody as to all other writs, for the illegality in one suit did not affect other suits, though privilege affected all: *Barrack v. Newton*. An arrest during privilege is not a trespass, and the party can only enforce his privilege by applying for a discharge. In *The Countess of Rutland's Case* it was said that a *capias* against a peeress might be lawfully executed by the sheriff, for as the Court issued the writ, the sheriff, as their officer, ought to obey it. And in *Watson v. Carrol*, where the plaintiff had been arrested in several suits while privileged as a barrister, and obtained another for his discharge in one suit, and claimed to be discharged in all, and because the sheriff detained him he brought an action, it was adjudged against him, for he was only entitled to his privilege as far as he claimed it, and if he claimed it only in one suit, the sheriff had a right to detain him in the others. The cases of privilege are therefore irrelevant to the question,—when is custody, which would otherwise be lawful, rendered unlawful by imprisonment by trespass?

With respect to the expediency of overruling *Barratt v. Price*, if my review of the authorities is correct, no uncertainty would be introduced into the law thereby; on the contrary, certainty would be increased by removing an anomalous inconsistency.

Except for the suggestion in *Collins v. Yewens*, that it tends to discourage bailiffs from imprisonments by trespass, I am not aware of any advantage being thought to flow from it; on the other hand, the evil from it is considerable. It comes into operation only where a trespass is committed upon a judgment-debtor evading legal process, and then its operation is to enable him *pro tanto* to render judgments fruitless, and to defeat his just creditors; and as he may recover compensation from the wrongdoer, this is a gratuity to an evasive debtor at the expense of an innocent party.

Also the mischief is not confined to the cases of a real trespass on a debtor, but it enables any debtor by a collusive trespass to take the

benefit of the rule in *Barratt v. Price*, and use it to defeat the law. The facts on this record, if I understand them rightly, exemplify what I mean. The counterfeit writ of *Arambura* answered the purpose of *Bacon* to be arrested by trespass under it, and it could not have been intended to answer any useful purpose as a writ, there being neither action, nor affidavit, nor præcipe; he was arrested as if waiting for it, he remained a week in nominal rather than real custody, protected by it, collecting his assets to go abroad; he then obtained his discharge from *Arambura* by notice not to the sheriff, but to the attorneys who had issued the writ which was so useful to him; he then applied to be discharged from *Lane's* suit, on a summons to the sheriff alone, without notice to *Lane*, and was ordered to be discharged, which order would not be properly obeyed unless he was so set free as that all trace should be lost. Thus protected, he escaped with his property abroad, and if *Barratt v. Price* is affirmed, his example may be followed by any debtor wishing for protection from his creditors, and able to procure an attorney to deceive the sheriff by a counterfeit writ, or a bailiff to trespass in arresting. The rule is bad between debtor and creditor, but it is worse as respects the sheriff. According to *Lane's* contention, the debtor who escapes by the rule in *Barratt v. Price* casts his debts on the sheriff, and if *Lane's* right is affirmed, a fraudulent debtor may suffer judgment to an accomplice for any sum which the sheriff would be likely to pay, and if a *capias* is lodged in that suit, and then an arrest by trespass in another suit according to the formula given above be added, the sheriff is fixed, and must pay the judgment-debt, unless he can unravel the conspiracy in time.

The rule, bad in its results to creditors, works extreme iniquity, if, as above suggested, it exposes the sheriff to be a victim for unmeasured loss in case one of the agents, whom he is obliged to employ in matters of intricacy and importance, deviates from his duty by mistake or corruption. If the principles in *Thurland's Case* had been acted on, viz., that wrong is properly checked by prohibiting advantage from it, and commanding compensation for it, and that a wrong thus disposed of is at an end, so that the law in all other respects should take its course, as if it had never existed, the decision in *Barratt v. Price* would have been reversed. But if it is not overruled, still the case of *Lane v. Bacon* may well be distinguished from it on the ground that the arrest in *Nokes v. Price* was taken to be a wilful intentional trespass in the execution of a valid writ. But the arrest in *Arambura v. Bacon* was a trespass by mistake of the sheriff, intending to do his duty and deceived by a void writ.

In *Collins v. Yewens* it is suggested that the rule in *Barratt v. Price* is useful to check intentional arrests by trespass, this being the only ground of expediency suggested, but this reason has no application to an unintentional trespass arising from a mistake. In case of an arrest under a writ *ex facie* valid, in reality void, all detainers are lawful; the case of an arrest under a writ void *ex facie*, but supposed to be valid, is more analogous to the latter class of cases than to the class where a trespass is intentionally committed in executing the writ, as in *Nokes v. Price*, which led to the decision in *Barratt v. Price*. This distinction is sufficient to protect the sheriff in this case; and if the remarks I have made to show that *Barratt v. Price* should be overruled are not sufficient for that purpose, they may be sufficient to show that it should not be

extended beyond the limits of the judgment given. But if *Barratt v. Price* is an erroneous decision, a great purpose of a court of error is fulfilled by overruling it, instead of recognising it and distinguishing from it.

With respect to your Lordships' third question, whether there was any evidence for the jury that the plaintiffs in error were guilty of a breach of duty towards the defendants in error in arresting Bacon under Arambura's writ, my answer is in the negative. I think there was not. The facts relating to this question are these:—Lane, during a former shrievalty, had left with the then sheriff a *ca. sa.* against one Anthony Bacon, without description or address in the writ, and during the shrievalty of the defendants below he had neither applied for any warrant, nor given any information, nor in any way enabled the sheriff to identify or find the Anthony Bacon he intended. Under these circumstances, as between the sheriff and Lane, the sheriff was under no duty to make out a warrant against Bacon, or to look for him, or to take any steps to assist him, as he could not know who was meant; but if a man named Anthony Bacon came into custody, and the sheriff was informed that he was the defendant named in Lane's writ, it would then have become his duty to hold him at Lane's suit. While Lane's writ remained in this state, Pearce & Co. deceived the sheriff by sending the clerk with a counterfeit *capias ad respondendum*, purporting to be at the suit of Arambura against Bacon, described to be of No. 4, Gower Place, Esquire; this clerk obtained a warrant thereon with a bailiff, and the arrest was made forthwith; the *capias* under which this arrest was made had all the requisites which give validity to all other writs of the Court of Exchequer except a writ of *capias* on *mesne process*, the regular form of a writ, the teste of the Chief Baron, and one seal of the Court; but for the validity of a *capias* on *mesne process* an extra mark is required, which is called signing, and is stamping. This mark the writ in question had not, it was therefore void on the face of it, and so the warrant and the arrest were illegal. The only evidence of negligence in the sheriff was the omission of the clerk to perceive the absence of the second seal before he granted the warrant on Arambura's writ to Pearce's clerk; and the only person whose interest was affected by that negligence was Bacon, who obtained this false imprisonment thereby. Upon these facts, at the first trial the Judge ruled that they proved actionable negligence towards Lane, and this was held erroneous in the Exchequer Chamber, because it was a question for the jury, whether the omission to perceive the absence of the second mark showed such a want of reasonable care as to be actionable. On the second trial, the question is left to the jury in form, but without any statement of the law on the point, and without any application of the evidence to the law of the case.

In support of my answer, that there was no evidence of any breach of duty towards Lane upon the part of the sheriff, it is necessary to ascertain what were the rights and duties between Lane and the sheriff, which depended on the writ. A party leaving a writ with the sheriff is, strictly, a principal dealing with an agent. The sheriff must execute according to his instructions, and, in this, as in all cases, his duty is placed between opposite perils.

If the writ is left, with orders not to execute, and the sheriff arrests,

he is a wrongdoer: *Walwyn v. St. Quinton*, 12 M. & W. 441,† S. C. 12 Law J. Rep. (N. S.) Exch. 144, and *Howard v. Canty*, 2 Dowl. & L. P. C. 115, S. C. 13 Law J. Rep. (N. S.) Q. B. 294; if it is left to be returned non inventus, it must lie; and the sheriff ought not to issue a warrant or arrest, but if the defendant is brought in, or chooses to come in, the sheriff must arrest: *Binks v. Mann*. The leaving a writ to be handed over from one sheriff to another, without information or application for warrant, did not create any duty to issue a warrant, or to inquire after Bacon, still less to arrest any person merely from the name of Anthony Bacon.

The judge expressed himself as if the attorney for Arambura, leaving a void writ against Anthony Bacon, with address and description, and requesting an immediate warrant thereon, with full information of identity, created some duty towards Lane which did not exist before, and which was broken by issuing a warrant for Arambura; and the notion seems to have been, that the sheriff not only should have found out that Arambura's writ was void, but also should have perceived, by intuition, that the Anthony Bacon sued by Arambura must be the defendant sued by Lane; and because Arambura applied for a warrant, he should have spontaneously issued another warrant, at the suit of Lane, against the unknown Anthony Bacon, and arrested him at the hazard of being able to prove his identity. This, I submit, was a mistaken notion, for the act of Arambura did not affect in any way the duty of the sheriff to Lane. Also, the ruling, that the sheriff had a duty to perform towards all persons leaving writs in the office, was a mistake, if it meant that he had the same duty towards all, although the instructions and information in respect of each writ might differ; but if it meant that the sheriff had a different duty according to the circumstances, such an explanation would have shown that Arambura's application for a warrant was no evidence of any duty to issue a warrant for Lane. If Arambura had not applied, there is no reason for saying that Bacon would have been arrested at the suit of Lane. If, in consequence of Arambura's application, he was arrested and lawfully discharged, he was not arrested at the suit of Lane; and Lane's position was not prejudiced or altered by Arambura's act, and so Arambura's interference was no evidence of a breach of duty towards Lane. This is one ground for my answer to this question in the negative.

Another ground for this answer is the same as that in respect of which a venire de novo was granted in the Exchequer Chamber after the former trial; there the Court, speaking of the sheriff's omission to perceive the absence of the mark which is necessary for the validity of a *capias ad respondendum*, said it would be left to the jury to consider whether that was evidence of such want of reasonable care as to be actionable; I understand by this that the Court adjudged that the mere fact of the omission to perceive the absence of the mark was not sufficient evidence from which the jury ought to infer a breach of duty towards Lane. I think that the fact by itself was not evidence of such want of reasonable care in the sheriff as to give Lane a cause of action; and although the case was sent down in order that this matter should be considered by the jury, and it was in form left to the jury, yet the Judge, in the summing up, stated to the jury that the sheriff could, with reasonable care, have discovered the writ to be void. The evidence on this point is the

same as on the former trial; the summing up is substantially the same; the omission to detect the deception by the counterfeit writ is the sole ground for imputing actionable negligence towards Lane. I cannot perceive that it is any evidence for the jury at all, much less can it be sufficient to justify the verdict for the plaintiff; and therefore, on this second ground the answer in the negative to the third question is supported.

To the fourth question my answer is in the negative. The omission to enter judgment for the defendant upon so much of the general issue as is found for him makes the judgment imperfect; but as there is no defect in the finding of the jury, there is no ground for setting aside the verdict, and sending the case to another jury.

To the last question my answer is in the negative; there is no such inconsistency in the findings as to preclude a judgment on the whole record.

COLERIDGE, J.—My Lords, in this case it will be convenient, before I answer the several questions which you have been pleased to put to us, to state very shortly, and in a few words, the material facts upon which they arise, as well as my general view of the law relating to them, after which the questions may, I trust, be answered in a few words.

Lane and others, the defendants in error, having recovered a judgment in debt against one A. Bacon, sued out a writ of *ca. sa.*, which was delivered to the then sheriff of Middlesex, and by him on going out of office turned over unexecuted to Hooper and Pilcher, the plaintiffs in error, the in-coming sheriff. One Juan Antonio Arambura had delivered to Hooper and Pilcher, then sheriff, an invalid writ of *capias ad respondendum*, for execution. A warrant was granted by them on this supposed writ, and under it Bacon was in fact arrested. Down to this time Lane and others had not, as is usual, given any information to Hooper and Pilcher where Bacon was to be found, nor had they taken any steps to get their writ executed. Bacon, discovering that he had been arrested illegally, applied to a judge to be discharged, and an order was made for his discharge from custody at the suit of Arambura. Hooper and Pilcher, however, claimed still to hold him on the *ca. sa.* previously issued by Lane and others, then in their possession; but on a second application to the same learned judge, the late Coltman, J., he was ordered to be discharged from their custody at the suit of Lane and others also. Being discharged, Bacon departed out of the bailiwick, and Hooper and Pilcher afterwards were unable to arrest him.

Upon this, Lane and others sued the sheriff for breach of duty; the cause was tried by Lord Denman, and a verdict passed for the plaintiffs under his direction.

A bill of exceptions was tendered and a *venire de novo* awarded, on which a second trial was had before Lord Denman, who directed the jury precisely in accordance with the judgment of the Court of Exchequer Chamber. The jury again found for the plaintiffs. A second bill of exceptions was tendered, and the Court of Exchequer Chamber holding itself bound, as is said, by the previous judgment, decided in favour of the new defendants in error without hearing their counsel. The present proceeding in your Lordships' House is substantially, therefore, to review the judgment pronounced by the Court of Exchequer Chamber on the first occasion.

It is now necessary to look more particularly at the material part of

the pleadings, and to the findings of the jury. The declaration assigned two breaches, complaining, in substance, first, that the defendants could have arrested under the good writ of the plaintiffs, but wrongfully neglected to do so. Secondly, that they had wrongfully arrested under the supposed writ, and detained Bacon under it, whereby he had become entitled to his discharge, and to his freedom for a reasonable time after, which had made it impossible for them to arrest him lawfully under the good writ, which writ had thereby become unavailing.

To the whole declaration the defendants pleaded not guilty, and several special pleas, which I need not particularly state, for the material questions arise on the first plea, and on a plea denying that the defendants could or might have taken and arrested Bacon as alleged. Lord Denman had ruled that there had been no arrest at the suit of the plaintiffs; and that Mr. Justice Coltman's order of discharge was no justification to the defendants; and the Court below were of opinion that this ruling was correct; and that if this were so, as under the circumstances the fact of there being no arrest at the plaintiffs' suit arose out of the sheriff's having arrested under the void writ illegally, a question of fact was raised to be determined by the jury, namely, whether the sheriff knew the writ to be void, or by reasonable care might have discovered it to be so, without establishing which, either the one or the other, the plaintiffs could maintain no action for negligence. The finding of the jury on the second trial makes it now material only to consider whether Lord Denman and the Court below were right in their judgment that there had been no arrest at the suit of the plaintiffs. Substantially the question thus raised will be found to turn on this: under what circumstances is an arrest, in fact, by the sheriff at the suit of one plaintiff to be considered as in fact, or to enure in law, as an arrest at the suit of any other plaintiff, who, at the time of such arrest, or during the imprisonment under it, has lodged a *ca. sa.* in the sheriff's office? For there was no pretence for saying that in fact, and by intention, the sheriff arrested at the suit of the plaintiffs when the illegal arrest took place at the suit of Arambura; and with a view to understanding the direction, this seems right to be stated, for it follows from it that the judge at *Nisi Prius* and the Court below must be understood to mean, that although Bacon was in bodily restraint by the act of the sheriff, yet such restraint was not attributable to the writ sued out by the plaintiffs in any such sense as to be justifiable under it. Arrest under a writ *simpliciter* means, of course, a lawful arrest, which that writ authorizes, and will maintain the continuance of; if it be meant to speak of it in any other sense, the qualification of illegal or unauthorized must be added.

In considering the question thus raised, I must venture to premise one or two general observations. Much has been said as to the natural right of the plaintiff in execution, and what is required in this case in order to do justice to him. Now, I know of no other right which a plaintiff recovering a judgment in a court of law has to satisfaction by imprisoning his debtor than that which the municipal law gives him. Some have supposed that the creditors of an insolvent might, by the Roman law, have divided his body among them; some, that even by our law an execution-creditor may detain the dead body of his debtor dying in prison. Our law denies the power of imprisonment in execution if the debt falls below a certain amount, but it gives it, where it gives it at

all, equally against the honest and unfortunate as against the fraudulent debtor; and it gives it equally to the harsh and extortionate as to the equitable creditor, without regarding circumstances.

In respect of mesne process, every one knows how importantly the powers of creditors as to imprisonment have been varied from time to time. The whole is the mere positive creation of the municipal law. If the plaintiff's case be within the rule which the law lays down, then he has a right. If it be not, he has none. And in searching what the rule is, it can serve only to mislead the judgment to assume certain natural rights or equities, and then infer that the rule of law must be that which secures them instead of examining the ordinary sources of legal information, and ascertaining from them what the rule actually is.

Next I will observe that in this examination of decisions it is a duty of great importance, if you find that, for a considerable period of time coming down to the present, certain decisions have been accepted as laying down the law, have been referred to from time to time, and recognised by the courts, and acted upon by those whom it particularly concerns as their guide, not to disturb those decisions even if you doubt whether they were wisely come to originally, and might perhaps have differed from them if you had then had an opportunity. This is a rule essential to the certainty of the law, and is, I think, equally binding upon us when answering questions propounded to us in this house, as when we are sitting in our own courts. However large your Lordships may consider to be the extent of the discretion under which you are authorized to exercise your judicial functions,—as to which I say nothing,—when you ask us what the law is, we are to answer exactly on the same principle as that on which we administer it in our own courts.

Upon these principles, I proceed to consider under what circumstances a party *de facto* arrested by the sheriff at the suit of one person is to be considered in law as arrested at the suit of any other who at the time of such arrest had placed a writ against his body in the hands of the sheriff. The principle upon which this question is to be answered is formally laid down in the case of *Barratt v. Price*, which for more than twenty years, according to my own judicial experience, has been commonly referred to as the leading case on the subject. It is this, that where the sheriff has once made an arrest, valid as regards himself and his own authority, his act operates as an arrest at the suit of all other plaintiffs in all actions in which he holds writs against the party at the time. He could do no more than go through the form of several arrests in those actions, and there is no necessity for him *actum agere*, that is, to arrest again the defendants whom he already holds arrested. But when the act he has done is one on which he cannot stand—is, as against him, a false imprisonment, an illegal arrest, then it cannot operate as a legal arrest under any other writ which he may hold. And this distinction seems a very reasonable one: where the sheriff has a writ good on the face of it, issues a lawful warrant, and causes the defendant not being privileged to be arrested in a place not privileged by the officer duly armed with the warrant, he has strictly obeyed the writ, performed his duty, and can do no more. It may be that owing to some previous misconduct of the plaintiff, of which he knows nothing, the arrest may be invalid as against him, but that will not affect the sheriff; his act

will still have its full effect as regards all other persons for whom he was acting at the same time. On the other hand, if the sheriff breaks the law in making his original arrest, that vice taints his whole proceeding, otherwise the same act must be considered illegal and legal at the same moment.

If this limitation of the rule be properly laid down, there can be no doubt that the present case falls within it. The sheriff could not justify the arrest of Bacon, for the only warrant which he had issued, and which the officer held and acted on, was founded on no writ; nothing but a good writ could be the sheriff's justification, and that justification was wanting.

Then, was the decision in *Barratt v. Price* founded on any sound principle, or has it been acted on since, without having ever been overruled? If both these questions are to be answered in the affirmative, it must be taken, I conceive, to lay down the law which at present the Courts at Westminster Hall are bound to administer.

It is not questioned, I believe, that the general rule as recognised in *Barratt v. Price* stands on previous authority. *Davies v. Chippendale*, 2 Bos. & P. 282, is a decision in point. So is *Barclay v. Faber*. But the question will be made on the limitation which it prescribes to the rule, namely, that it will not apply where the first arrest is illegal in respect of some act of the sheriff himself. All the decisions, and they are not a few, in which it has been held that where the illegal arrest has been procured by a wrongful act of the plaintiff himself, he cannot avail himself of it so as to detain under any other legal process so long as the original illegal custody continues, may be considered as authorities by analogy for this limitation. As such a wrongdoing plaintiff cannot use his own wrongful act to make available a subsequent detainer, which but for this might have been valid, so the sheriff cannot use his in order to the execution of other writs which it is his duty to execute.

But all the three Courts have recognised the limitation: in *Pearson v. Yewens*, the Common Pleas; in *Robinson v. Yewens*, the Court of Exchequer; in *Collins v. Yewens*, the Court of Queen's Bench. Both these latter cases are important. In the first of them Parke, B., speaks of the distinction laid down in *Barratt v. Price* "as a very proper and reasonable one," and all the three Judges who decided the case make the hinge of the decision to be whether the facts were within *Barratt v. Price* or not. In the last the judgment of the Common Pleas, and the language used by Tindal, C. J., in enunciating the principle, were expressly cited and made the ground for the decision. These three cases concerning the same defendant and decided at the same time, having each some varieties in their facts, which did not escape notice, presented the general question in all its bearings; and I hardly know how the decision of a single Court could receive a more satisfactory confirmation and settlement, short of a judgment of this House, than *Barratt v. Price* then received by those three independent judgments.

This was in 1839. In 1853 *Egginton's Case* came before the Court of Queen's Bench on two occasions, and was much considered. In it the limitation laid down in *Barratt v. Price* was applied to the case of a criminal arrest. On two occasions the same parties sought to detain by new and in themselves unobjectionable warrants, one whom they had first arrested illegally on the same charge, and he was discharged as to

both; but a plaintiff in a civil suit, being entirely unconnected with the former proceedings, having delivered a writ of ca. sa. to the sheriff while the party was in custody, and the sheriff having made his warrant and detained him, such detainer was held good, *because* the original arrest had not been made by any one as officer of the sheriff, and so *Barratt v. Price* became as to this last detainer inapplicable.

I own it seems to me that here is abundant authority on which such a point as this ought to be considered settled; and even if I were satisfied that earlier cases might be found in the Year Books, or Lord Coke's Reports, or elsewhere, on which doubts might be raised, or that if the matter were entire, some more satisfactory conclusion might now be come to, I should not be in the least moved as to the propriety of abiding by what has been thus determined.

It is, no doubt, true that this is not a conveyancing or an insurance cause, and that your Lordships will not disturb the practice of Lincoln's Inn, or unsettle the course of business in Lloyd's Coffee House, by reversing *Barratt v. Price*, but it is never without mischief that uncertainty is introduced into legal decision.

I must not, however, be understood as conceding that the case was decided inconsistently with old authorities. I do not mean to go through the long series of decisions cited at the bar and commented on to-day, but I will mention two or three a good deal relied on in argument on the other side, and as I think without foundation.

The earliest is the Year Book, 18 Edw. 4, 4—19, which is shortly this:—Catesby comes to the Bar and asks whether a sheriff breaking into a dwelling-house to execute a fi. fa. does a wrong or not: the Judges answer that the defendants may bring trespass against him, notwithstanding the fi. fa., for that will not excuse him for breaking the house, but "*del prisel des biens tantum*." This is cited in *Semayne's Case*, as establishing that the sheriff cannot break the dwelling-house by force of a fi. fa., but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good. It may be doubted whether the Judges meant anything more in the Year Book by the words above cited than to state generally what a fi. fa. authorized a sheriff to do. But assuming that they did, still the dictum there and that in *Semayne's Case* are both purely extra-judicial. To make, however, either the one or the other of any weight in this argument, even if they were decisions, it must be inferred that here, though the sheriff might have committed a trespass on Bacon, for which Bacon might have sued him, yet the arrest, even at the suit of Arambura, was valid, as in those cases the taking of the goods was justifiable. But this, I suppose, no one will be bold enough to contend; and, if not, their effect is the other way, as they lay a foundation for that distinction between execution on goods and execution on the person, which Parke B., pointed out in *Percival v. Stamp*: a case which, indeed, is an authority for those who uphold *Barratt v. Price*.

Thurland's Case has also been cited, but to as little purpose when the facts are examined and the principle of the judgment ascertained. According to the second report of that case (2 Dyer 244 b), which is more intelligible than the first, at page 241, the sheriff at the request of the plaintiff's agent, arrests a judgment-debtor without writ or warrant; then they two procure a ca. sa. and arrest him again, and bring him

into court at the return day with the writ returned *cepi corpus*. The defendant prays the court to reject the writ and return. The plaintiff prays the court to commit him in execution, and "upon great consideration the prayer of the plaintiff was granted, because he was not particeps criminis in this undue arrest, which was tortious to the defendant, of which injury or fraud the plaintiff should not have any advantage, although these followed a legal act; and also a writ of false imprisonment lies against the agent of the plaintiff and the sheriff, in which the party shall recover damages *as well for the last arrest and continuance of the imprisonment as for the first*. But because the plaintiff was found clear and free of the injury and covin in the purchase of the writ, therefore the defendant shall be committed, &c., and the sheriff shall be amerced 10*l.* and the agent 5*l.*" The reporter put a query here as to the liability for the last arrest; but the material point now is not whether the case was well decided, which may well be doubted, but on what principle the Court proceeded. Now, it is clear the Court considered the sheriff wrong throughout, and that as against him even the arrest under the good writ was a wrongful act; but because there was a good writ and a subsequent arrest under it, which in themselves would have warranted the defendant's detention, and the plaintiff stood free of all complicity in any wrongful act, they at his prayer committed the defendant to the Fleet, and so gave him the benefit of that second arrest. How, then, is this decision available for the sheriff on the question now before the House? But I would seriously ask those who rely on it, whether they contend that sheriff's officers may apprehend debtors without writ or warrant, and then, by subsequently obtaining both, become entitled to hold them? I hardly know a doctrine more contrary to legal principle, or more likely to lead to mischievous breaches of the peace and acts of violence. Yet this would seem the legitimate inference to be drawn from *Thurland's Case*, as apparently understood on the other side.

But in *The Countess of Rutland's Case* the true rule seems laid down. There the sheriffs had a good writ against the Countess, and had issued a warrant: the officers proceeded illegally, took her to the Compter as in another pretended suit; at the door of the prison the sheriff appeared and carried her away to his own house. The Court held the arrest illegal, and would not refer it to the writ and warrant, saying, that "the sheriff, or any other by his authority, who makes an arrest ought, on the arrest, to show at whose suit it is, out of what court, for what cause he makes it, and when the process is returnable; to the intent that if it be for any execution he might pay it and free his body, if he will, from imprisonment, and if it be on mesne process, either to agree with the party or to put in bail according to law, and to know when he should appear." I might add, perhaps, to this another reason, that the defendant might know with all certainty that he is bound to yield submission to the person who assumes to deprive him of his liberty.

The cases of *Howson v. Walker* and *Crowden v. Walker* were relied on in the argument, and have been to-day, but they received their explanation from the Court in *Barratt v. Price*. Herne, who committed the illegal act in making the first arrest, was indeed a sheriff's officer, but there is nothing stated in the case which shows that he was acting by the command of the sheriff or with his privity—there was nothing therefore to prevent the sheriff by *Howson*, to whom he had previously

granted a warrant, from availing himself of the means of arresting him which the illegal custody afforded; and if it had been clear that the plaintiff Howson had been equally clear of complicity with Herne, I should have thought that the second arrest would have been equally available for him. I suspect, if the facts of the case were fully before us, it would be found that Herne had acted at the request or with the privity of Howson or Howson's attorney.

On these grounds I conclude that the Court below was right in holding that Lord Denman's direction to the jury, on the fact of an arrest, was correct; and I now proceed to answer your Lordships' questions shortly in order.

To the first and second questions, which appear to me to stand on the general grounds which I have already discussed at so much length, my answer is in the negative.

To the third question, I answer in the affirmative. I think that there was evidence of negligence in the discharge of that duty which the plaintiffs in error owed to the defendants in error, at the time when they arrested under Arambura's (supposed) writ.

To the fourth question, it seems to me that the record is incomplete, and therefore erroneous in not discharging the plaintiffs in error as to so much of the issue on not guilty as was found for them.

To the fifth question, I answer, that to deny that the defendants wrongfully, unjustly, and illegally took and imprisoned Bacon under a false and illegal pretence, and to affirm that they did take and imprison him under a false and illegal pretence, the pretence specified in both propositions being the same, are propositions repugnant to each other in terms. But I cannot, therefore, infer that the findings on this plea of not guilty, and on the seventh plea, are necessarily inconsistent; for the allegation in question does not constitute the whole of the complex issue raised by the plea of not guilty, and the finding of the jury may, therefore, not have depended on it. I do not, therefore, think that a venire de novo is necessary on this ground.

Cur. adv. vult.

The Lord Chancellor, after fully stating the circumstances under which this writ of error had been brought before the House, said that the Judges were divided in opinion; that some of them thought that the defendants in error had no cause of action against the plaintiffs in error, the sheriffs, because there was no rule of law which prevented sheriffs who had in their custody, by a trespass, the body of a debtor, from executing against that debtor a valid writ of ca. sa. issued at the suit of the person who had nothing to do with the trespass; that therefore Bacon ought not to have been discharged by Coltman, J., but ought to have been detained on the demand of the sheriff, who claimed to detain him in virtue of the valid writ issued by the defendants in error, and so that the damage of which Lane and the others complained had not been occasioned by the act of the sheriff, but of the Judge. On the other hand, some of the Judges were of opinion that when a sheriff has a defendant in custody under circumstances which make that custody illegal, as between the sheriff and the party detained, and entitle that party to his discharge, the sheriff is bound to discharge him, whatever valid writs may be at that time in the sheriff's hands; that, therefore, the illegal arrest of Bacon at the suit of Arambura was an act of negli-

gence which, as a natural consequence, disabled the sheriffs, under the circumstances here, from executing the writ issued by Lane and the others, the now defendants in error. The case turned entirely on the question, what was the effect of an illegal arrest of a debtor upon other persons who, at the time of such arrest, had valid writs in the hands of the sheriffs? Was the party so arrested entitled to be set at liberty, in spite of such other writs, or might the sheriff be required to execute them, and could he lawfully execute them? Upon principle it was contended that any rule which prevented the sheriff from executing the lawful writs, because he had already executed an invalid writ, was unreasonable, and was unjust both to the sheriff, who might have been guilty only of some small want of caution, or might even be free from all blame whatever, the error occasioning the invalidity being the act of some other person—and to the plaintiff in the suit, who might be entirely innocent of any want of regularity or of caution. And, further, it was said that such a rule might enable a fraudulent plaintiff and defendant to collude together, and by making an invalid arrest of the defendant to put it out of the power of his honest creditors to make any arrest at all. On the other hand, it was said that to allow the sheriff to avail himself of a custody which he brought about by illegal means would be to encourage carelessness and misconduct, and that the liberty of the subject required that a person who had been illegally arrested should have an absolute right of discharge without reference to the consequences which might indirectly flow from it. On weighing these arguments carefully, he had come to the conclusion that those in favour of the defendants in error must prevail. It had been contended here, that the sheriff was the agent of those who put their writs into his hands, and that his officers were his agents for the execution of the particular writ delivered to them. This was true for some, but not for all, purposes. The arrest was not, in fact, made by the sheriff, but by one of his officers; and though the act of the officer was the act of the sheriff, for the purpose of making the sheriff responsible to persons thereby affected, yet as to third persons it was said to be otherwise. But though, for some purposes, the sheriff was an agent of the party who put a writ into his hands, he was not a mere agent—he was a public functionary, having duties to perform to certain persons analogous to those of an agent, but as to those against whom these writs were directed he had duties of a different kind. For that reason arguments drawn from the analogies of writs of *fi. fa.* had little bearing on the present case. A sheriff illegally breaking open an outer door and seizing goods might be liable for the illegal breaking, and might yet (if the case cited from the Year Books correctly laid down the law) be entitled to sell the goods, for the goods could not complain of the wrongful act, and would suffer nothing from it, whereas a man unlawfully arrested did suffer from the unlawful arrest itself. Where an arrest had been made on a valid writ, the sheriff might detain on any number of valid writs which he had at the time or which afterwards reached him. But if the sheriff made the arrest on an invalid writ, it would give him no right to detain the party arrested, but he must at once discharge that party. Such a person could not be treated as one who had been lawfully deprived of his liberty, and an arrest on a valid writ would be necessary. Such an arrest could not be made by the sheriff while the debtor was unlawfully confined by him, for that

would be to allow the sheriff to profit by his own wrong; he could not arrest the defendant, because he was already deprived of liberty; nor even detain him, because he would be entitled to be discharged. The case of *Barratt v. Price* could not be distinguished from that which was now before the House. There a debtor unlawfully arrested was ordered to be discharged, but he was detained on a *ca. sa.* which had been lodged with the sheriff by *Barratt* (who was in no way connected with the illegal arrest), and the question was whether the defendant was entitled to be discharged from that detainer as well as from the original illegal arrest. The Court ordered him to be discharged, because, being illegally arrested, he was not in custody under the first writ, but was suffering a false imprisonment which could not operate as an arrest under the other writs lodged with the sheriff. When a man is in custody under a false writ, the sheriff is a mere trespasser, and in contemplation of law has not arrested the defendant at all. The present case had been sought to be distinguished from *Barratt v. Price*, on the ground that there the first arrest was executed by a fraudulent contrivance, which had not been the case here. That distinction did exist, but the judgment of the Court there did not proceed on the fraudulent contrivance, but on the general principle that where a defendant was in custody of the sheriff under circumstances which entitled him to his discharge, he would be entitled to it, though the sheriff might at that time have in his hands a writ under which an arrest might have been legally made. The case of *Barratt v. Price* was decided in the Court of Common Pleas, when Chief Justice Tindal presided there, and it had subsequently been recognised as good law in all the courts in Westminster Hall. In *Pearson v. Yewens* in the Common Pleas, and in *Collins v. Yewens* in the Queen's Bench, the defendant was discharged on the ground that he had been taken on an illegal arrest, to which the defendant had made himself a party; and though on the same arrest the Court of Exchequer, in *Robinson v. Yewens*, had refused to discharge the defendant, it was because that Court was not satisfied that the sheriff had there made himself a party to the original illegal detention; and if a sheriff had a writ against any one in his bailiwick, it was his duty to arrest that person, whether he was at large there or is illegally detained there by a stranger. Though this House was not bound by the decisions of Courts below, yet it was manifestly inexpedient that what had there been acted on continuously should be disregarded here, unless the judgments of those Courts were clearly shown to have proceeded on mistaken principles. That did not appear to be the case here, and though *Barratt v. Price* might not be in accordance with the early case of *Thurland*, yet this House would do well to follow the modern doctrine which had been thus, by all the Courts, acted on for so many years past. In the present case, Lord Denman told the jury in substance that the question was, whether the sheriff had been guilty of culpable negligence or breach of duty towards the plaintiffs below, in having arrested *Bacon* on *Arambura's* supposed writ; and that if the sheriff knew, or might be supposed to know, that that supposed writ was void, so that by arresting *Bacon* upon that writ it would be impossible to detain him on the writ of *Lane*, that that was culpable negligence and breach of duty. That direction was perfectly correct; the bill of exceptions to it could not be sustained, and on that point judgment must be entered for the defendants in error. On one formal

matter the judgment below was erroneous. On the plea of "not guilty" to the second breach the jury found for the defendants, the sheriffs. The damages were properly assessed on the first breach only, and judgment was given for the plaintiffs accordingly to recover the sum so assessed, but no judgment was entered on the issue found for the defendants on the second breach. The judgment on the first breach was right, but there ought to have been a judgment that as to the second breach the defendants should be discharged without day. The record might now be set right by being amended in that particular. That being done, judgment must be given for the defendants in error.

Dowdeswell, on the part of the defendants in error, applied that interest might be allowed from the date of the judgment in the Exchequer Chamber, pursuant to 3 & 4 Will. 4, c. 42.

The Lord Chancellor said that the defendants were entitled to such interest, but intimated a doubt whether the order for interest ought not to be made in the court below.

Judgment of Exchequer Chamber affirmed.

COOPER v. SLADE.(a) *June 29, 30, 1857—Feb. 15, April 17, 1858.*

S., a candidate at an election of members of Parliament, being in his committee-room, and asked by his election agent whether it was legal to pay the travelling expenses of out-voters—i. e., the money out of pocket—replied, after consulting a law-book, "I am of opinion that it is legal;" whereupon the agent's clerk, who was present, immediately added to a printed circular addressed to outvoters, and requesting them to come and vote for S., the words, "Your railway expenses will be paid." C., an outvoter, received one of the letters, and went by railway and voted for S., and was paid his travelling expenses out of pocket by S.'s agent. In an action to recover penalties for bribery under the statute 17 & 18 Vict. c. 102, s. 2, the 7th count being for paying money to induce C. to vote, and the 8th count for corruptly paying money to C. in consequence of C. having voted for S.:

Held (reversing the judgment of the Ex. Ch., *Bramwell, B.*, dissenting), that, assuming the letter to be sent by S.'s authority, there was evidence for the jury that S. was guilty of bribery within 17 & 18 Vict. c. 102, s. 2, for that the letter meant that the payment was to be conditional on C. voting for S.:

Held, further (*Coleridge* and *Wightman, Js.*, and *Bramwell, B.*, dissenting), that there was evidence for the jury of the defendant having authorized the letter to be sent.

Held, further (*Lord Wensleydale* doubting, and *Coleridge* and *Wightman, Js.*, and *Bramwell, B.*, dissenting), that there was evidence for the jury of S. having corruptly paid money to C. in consequence of C.'s voting, within the 17 & 18 Vict. c. 102, s. 2.

Held, further, that the evidence was not sufficient to support both counts, so as to enable two penalties to be recovered, there being only one act of bribery.

Majority of the Court—*Lords Cranworth* and *Wensleydale*, *Williams*, *Crompton*, and *Willes, Js.*, and *Watson* and *Channell, Bs.*

THIS was a proceeding in error on a judgment given in the Exchequer Chamber. An action for penalties had been brought against the defendant under the Corrupt Practices Prevention Act, 1854, in respect of bribery alleged to have been committed by him at the Cambridge election in August, 1854. The facts of the case are fully set forth in the report of the case in the court below, 25 Law J. Rep. (N. S.) Q. B. 324, and the following summary of them is all that is necessary to be stated here.

At the election in August, 1854, Lord Maidstone and Mr. Slade were

(a) 27 L. J. Q. B. 449; 4 Jur. N. S. 791; 31 Law Times Rep. 334. The syllabus of this case is taken from the report in the Law Times; the body of the case from the Law Journal Reports.

candidates on the same interest. One of the Cambridge electors, named Carter, was at Huntingdon, and the following letter, addressed "Mr. R. Carter," was sent to him from the defendant's committee:—"Cambridge Borough Election Committee-Room, Lion Hotel, Aug. 12, 1854. Sir,—The mayor having appointed Wednesday next for the nomination and Thursday for the polling, you are earnestly requested to return to Cambridge and record your vote in favour of Lord Maidstone and F. W. Slade, Esq., Q. C. Yours truly, C. BALLS, Chairman." After the signature came the words "Your railway expenses will be paid." These words were in writing, the letter (except the name of Carter) was printed. There was evidence that at the time of the election there had been a discussion in the defendant's committee-room as to paying the travelling expenses of outvoters, and the defendant had said that in his opinion the payment of such expenses was legal. He founded his opinion upon one attributed in an election law-book to Lord Chief Justice Tindal. It was said that the defendant had qualified this expression of opinion by saying "merely the expenses out of pocket." It was after this expression of the defendant's opinion that the words in writing were by the clerk of the defendant's agent, though not by the defendant's direct authority, added to the letter.

There were several counts in the declaration, but on the suggestion of Mr. Baron Parke, before whom the cause was tried, the plaintiff's case was ultimately made to rest upon two counts. These were the seventh and eighth. The seventh count alleged a promise to pay in order to induce Carter to vote, the eighth count alleged that the defendant had given money to Carter on account of Carter having voted. The learned Judge left it to the jury to say whether, upon the evidence, the defendant did, by himself or by any other person on his behalf, authorized by him so to do, promise money to Carter in order to induce him to vote for the defendant, and if so, he directed that the verdict must be for the plaintiff, though the money promised was no more than the fair expenses of Carter travelling from Huntingdon to Cambridge and back again; and as to the eighth count, the learned Judge left it to the jury to say whether the defendant did give money to Carter on account of Carter's having voted for the defendant, in which case the verdict must be for the plaintiff, although the money (as the fact was) was no more than the fair and reasonable travelling expenses of Carter, and although the defendant honestly believed that he was committing no offence thereby. The defendant's counsel excepted to this direction. The jury found a verdict for the plaintiff on the seventh and eighth counts, subject to these exceptions. The case was argued in the sittings after Easter Term in the Exchequer Chamber, when a *venire de novo* was awarded.

Error was now brought on this judgment. The Judges were summoned, and Justices Coleridge, Wightman, Williams, Crompton, and Willes, and Barons Bramwell, Watson, and Channell, attended.

Sir *F. Kelly* (with whom were *O'Malley* and *Lush*) appeared for the plaintiff in error, contending that there was evidence to go to the jury, and that the direction on that evidence was correct. He referred to *The Queen v. Cooper*, 15 Law J. Rep. (N. S.) Q. B. 206.

The Attorney-General (Sir *R. Bethell*) (with whom were *Couch* and *Kingdon*), for the defendant, insisted that here no promise had been

made nor money paid corruptly so as to bring the defendant within the operation of the statute. He referred to *Bremridge v. Campbell*, 5 Car. & P. 189 (E. C. L. R. vol. 24); *Bayntun v. Cattle*, 1 Moo. & R. 265; *Lord Huntingtower v. Gardiner*, 1 B. & C. 297 (E. C. L. R. vol. 8); and *Allen v. Hearn*, 1 Term Rep. 59.

Sir *F. Kelly* replied.

The Lord Chancellor put the following questions to the Judges:—

1. Whether assuming the letter of the 12th of August, 1854, to have been written and sent to Carter by the direction and authority of the defendant in error, there was any evidence for the jury that the defendant was guilty of bribery within the true intent and meaning of the 2d section of 17 & 18 Vict. c. 102?

2. Whether there was any evidence for the jury that the letter in question was written and sent by the direction or authority of the defendant in error?

3. Whether there was evidence that the defendant corruptly paid money to Carter on account of his having voted at the election?

Feb. 15, 1858.—CHANNELL, B.—My Lords, it is not without considerable diffidence and distrust as to the correctness of my own opinion that I venture in this case to dissent from the judgment of the Court of Exchequer Chamber.

Whatever difficulty there may be in drawing the proper inference from the facts of the case, there is no doubt as to the facts themselves. They are few in number, and are stated in the bill of exceptions tendered to the ruling of the learned Judge who tried the cause. The question is, was there any evidence proper to be submitted to the jury in support of the seventh and eighth counts of the declaration?

If there was any evidence proper to be submitted to the jury, the jury must be taken to have exercised their discretion and judgment upon the matter; the verdict at *Nisi Prius* must then stand, and the judgment of the Court of Exchequer Chamber be reversed. I am of opinion that there was such evidence.

It is in my opinion unnecessary to consider whether, prior to the act 17 & 18 Vict. c. 102, the *bonâ fide* payment of mere travelling expenses was illegal. Nor is it, in the view that I take of this case, necessary to decide whether, since the act, a promise to pay travelling expenses is void within that statute, if unaccompanied by a condition that the person to be paid is to vote for the party promising to pay.

I concur with the Court of Exchequer Chamber in thinking that a promise to pay a voter on condition that he votes for the party promising to pay is an offence within the act.

Was the letter set out in the bill of exceptions such a promise? I think it was. The writer did, by that letter, promise to pay the voter's travelling expenses. The plain meaning of the letter is this:—"Come and vote for the defendant, and then your railway expenses shall be paid." I am unable to find room for any doubt that this was the meaning of the particular promise, for some promise there undoubtedly was. Assume that a promise to pay a voter his travelling expenses was legal; that no act of Parliament had, in direct terms, or in language which might be contended to have that effect, invalidated such a promise; assume a promise such as that stated in this letter, I inquire, could an action have been maintained on the promise by the promisee if he had not voted at

all, or had voted against the defendant? It is, to my mind, impossible to come to such a conclusion; but such is, I think, the necessary conclusion, if, there being some promise to pay, that promise is to be considered an absolute and unconditional promise to pay the travelling expenses of the elector coming to the town, irrespective of the question whether or how the elector voted.

Then, did the defendant authorize the writing and sending such a letter? The defendant acted, I have no doubt, in the honest belief that the payment of mere travelling expenses was legal; he gave no more than well merited respect to the opinion attributed to the very learned Judge whose opinion he referred to. But the question to my mind as regards the seventh count is, not what the defendant may have thought to be legal, but what he did; and whether what he did was an offence against the statute.

But it is said that if the construction of the letter be that which I have assumed, then that the defendant did not authorize such a letter. I think he did. He meant to express his opinion that the travelling expenses of the voter might be paid; he meant, I think, to authorize his agent to pay those expenses. If I am to assume that he gave any authority at all, what ground is there for supposing that he meant it to be an authority to pay expenses without having the contemplated advantage, viz., the vote of the elector in his favour? I see none. The observations I have made I have intended to apply more particularly to the seventh count. The eighth count may require a somewhat different consideration. It was strongly argued at your Lordships' bar that, assuming the defendant gave authority, there is no evidence that he gave it corruptly.

First, did he give? In my view he authorized his agent to pay. The agent paid, the agent gave; the agent paid to a voter who had voted for the defendant, with the knowledge that he had so voted, and, as I think, it must be taken, with a knowledge of an antecedent promise that the elector so voting was to be paid his travelling expenses. That, in my opinion, was evidence proper to be submitted to the jury upon the eighth count.

In a moral point of view there may have been nothing corrupt in the conduct of the defendant, acting on the belief that I think he did. But the defendant's conduct would have been corrupt within the meaning of the statute if the defendant had himself promised contrary to the statute, and had himself paid in fulfilment of his promise, after obtaining an advantage which the statute means he should not obtain. That would, I think, have been an offence within the meaning of the statute. The defendant did not do all these acts himself, but there was evidence that he did so by an agent or agents whom he authorized, so as to raise a case proper to be submitted to the jury.

I answer your Lordships' first question by saying that, assuming the letter of the 12th of August, 1854, to have been written and sent to Carter by the direction and authority of the defendant in error, there was evidence for the jury that the defendant was guilty of bribery within the true intent and meaning of the 2d section of the 17 & 18 Vict. c. 102.

To your Lordships' second question, I answer, that there was evidence for the jury that the letter in question was written and sent by the direction or authority of the defendant in error.

To the third, that there was evidence that the defendant corruptly paid money to Carter on account of his having voted at the election.

WATSON, B.—My Lords, in answer to the first question proposed to the Judges by your Lordships, I am of opinion that, assuming the letter of the 12th of August, 1854, to have been written and sent to Carter by the direction and authority of the defendant in error, there was evidence for the jury that the defendant was guilty of bribery within the true intent and meaning of the 2d section of the 17 & 18 Vict. c. 102.

That enactment is, that all persons (amongst others) shall be deemed guilty of bribery, “who directly or indirectly, by himself or by any other person on his behalf, shall give or lend, or shall *offer or promise* to give or lend any money to or for any voter in order to induce any voter to vote or to refrain from voting” at an election of members of parliament. It is not necessary that the voter should vote, or even promise to vote, to constitute an act of bribery under that provision.

It has been suggested, that to bring a promise within this provision it must be a conditional promise to pay the travelling expenses if the elector vote for the promiser. It appears to me that it would be equally within the meaning of the act if the promise was unconditional, simply to pay money on the elector voting at all, inasmuch as the candidate may have a full reliance (perhaps erroneously) how the vote should be given, and that such promise would be an inducement to vote whether conditional or unconditional. Be that as it may, the letter in this case requesting the voter to vote for Lord Maidstone and Mr. Slade, and adding a postscript, “Your railway expenses will be paid,” is evidence of an offer of money in order to induce him to vote, on either construction of the statute.

With respect to the proviso at the end of the section, it was argued at the Bar, that the payment of *bonâ fide* travelling expenses is legal. This requires examination. No doubt, according to the interpretation put on the 2 Geo. 2, c. 24, s. 7, in the case of Lord Huntingtower v. Gardiner the payment of travelling expenses, or, indeed, any other sum of money, after the election, to a voter for having voted, without any promise to that effect before voting, is legal under that act; whether a promise to pay travelling expenses to an elector, in order that he might vote for a particular candidate, was legal under the law as it then stood, is not by any means determined thereby; certainly there is no such decision to that effect in the courts of law.

The only two cases at law are, first, Bayntun v. Cattle, where Alderson, B., upon a question whether the defendant had authorized certain payments made by the plaintiff for travelling expenses, in summing up to the jury, observes, “A difference has existed as to the legality of such payments (*i. e.* travelling expenses), some Committees of the House of Commons having held that such payments are legal; others (and probably this is the more correct opinion), that such payments are not legal.”

In the second case, Bremridge v. Campbell, before Tindal, C. J., the plaintiff sought to recover moneys, amongst others, large sums, as and for the travelling expenses of voters paid by him on account of the defendant whilst a candidate for the borough of Barnstaple. The objection taken there was that the sums charged were not *bonâ fide* travelling

expenses, but evidently given as bribes, and Tindal, C. J., in answer to such objection, says, "I shall leave it to the jury to say whether they believed that the money was given *bonâ fide* for expenses or not. Each voter from the same place receives the same sum."

It is certainly clear that neither of these learned Judges expressed any opinion that a payment, or an offer, or a promise to pay travelling expenses before the election, to induce an elector to vote, was not bribery under the then existing law.

A candidate at an election for members of parliament is under no obligation, legal or moral, to pay the necessary travelling expenses of voters, any more than for the loss of the voters' time. The voter is called on to exercise his franchise for the public benefit, and a promise to pay would appear to be without consideration, not a *bonâ fide* debt, or any debt at all. Indeed, I am of opinion that such promise is illegal, according to the principle laid down by Lord Mansfield—*Allen v. Hearn*—where that learned Judge says, "That one of the principal foundations of the constitution depends on the exercise of the franchise; that the election of members of parliament should be free, and particularly that every voter should be free from pecuniary influence."

Whatever doubts formerly existed, the last act was passed because "the laws to prevent corrupt practices have been found insufficient;" and it makes any promise to pay money to induce an elector to vote an act of bribery,—and this, no doubt, to prevent money payments to voters at all, more especially as they had been a colour and a pretence for wholesale bribery.

The proviso at the end of section 2 provides, "It shall not extend or be construed to extend to any money paid or to be paid for or on account of any legal expenses *bonâ fide* incurred at or during the election." No doubt this proviso refers to the various legal expenses incurred at elections, such as printing, messengers, hire of committee-rooms, tavern expenses, and expenses of that nature; and was intended to exempt cases where a candidate had paid such sums, or agreed to pay them, before the election, to keep the voter in good humour, or, in other words, to induce him to vote.

In answer to the second question, I am of opinion that there was evidence for the jury that the letter in question was written and sent by the authority of the defendant in error. It seems that the circular, with the postscript, issued from the defendant's committee at Cambridge, and that at the committee-room, for the guidance of the committee, and of Peed in particular, the defendant said that the travelling expenses might be paid, in answer to a question, "Whether it would be legal to get up the out-voters and pay their legal travelling expenses which they paid out of pocket;" and Thirkettle wrote these words at the bottom of the letter, "Your railway expenses will be paid," after the defendant said that the payment of travelling expenses was legal. It seems to me impossible to withhold such evidence from the jury, *when the defendant gave an opinion for the guidance of the committee, that they should bring up the out-voters.*

To the third question, I am of opinion that there was evidence that the defendant corruptly paid money to Carter on account of his having voted at the election; as it appears to me, there was evidence of a promise amounting to bribery on the part of the defendant, and so found

by the jury, the payment in pursuance thereof falls within the meaning of the word "corruptly" in the statute.

BRAMWELL, B.—In answer to your Lordships' question in this case, I beg to refer to the judgment of the majority of the Court of Exchequer Chamber, which included Alderson, B., Cresswell, J., Crowder, J., Martin, B., and myself, and by which, with one exception, I abide. In that judgment it is said, "It will be seen we attach no weight to the proviso at the end of section 2 of the statute 17 & 18 Vict. c. 102." I incline to think that is wrong, and that the reasons given for the opinion are not sufficient. The difficulty, with all respect, is the fault of the legislature: see Clerk's Election Law, p. 82. The statute prohibits, and so makes certain acts illegal, and then excepts "*legal*" expenses. Necessarily, everything legal is excepted from or not within what is illegal, and the section, therefore, is open to the criticism on it in that part of the judgment I refer to. But it is not right to hold any part of an enactment nugatory or needless, if a meaning and purpose can be given to it. This was powerfully pressed by the Attorney-General in his argument before your Lordships, and I think that argument should prevail, in part at least. The whole provision may well read thus:—"Every person who shall promise, &c., money, &c., in order to induce any voter to vote, shall be guilty of bribery, provided that this enactment shall not extend to any money paid or agreed to be paid for or on account of any expenses *bond fide* incurred at or concerning any election; and provided such expenses are not illegal on some other ground than this prohibition." There may be such cases. For instance, the expenses of committee-rooms and advertisements are not unlawful, and are not so, though incurred with a particular person to induce him to vote. This is the meaning given to this proviso by the defendant's counsel below.

Still it remains to consider whether travelling expenses are expenses incurred at or concerning an election, and are not otherwise illegal than as being within the terms of the general prohibition in section 2. Now, I think they are not otherwise illegal; they are not in terms prohibited by this the only statute on the subject, nor were they, I think, within any definition of bribery at common law. But then, are they expenses incurred at or concerning an election? I think not. I think that means the necessary expenses of an election,—those expenses that are incurred and would be incurred whether the candidate did or did not wish to induce any particular voter to vote. I still think, therefore, this provision does not help the defendant, and I think the judgment wrong only in saying that the proviso is nugatory, as I think it has a meaning, viz., that above mentioned.

But as I have said, I abide by the other part of the judgment. I am of opinion the letter is not evidence of a promise to pay the expenses conditional on Carter's voting, and that if it is, there is no evidence that the defendant authorized it. I do not, as a fact, believe that the voting was made a condition of the payment. I doubt not that had Carter come, and it had been found that he had not a vote, or came too late to give it, or by some other accident was prevented voting, he would still have been paid. No doubt there was an expectation that he would vote for the defendant, but an expectation is very different from an engagement or condition. No doubt, also, he would not have been paid had he voted for the opposite candidate; but the penalty is sued for, not for offering

money to induce him not to vote, but to vote; and, indeed, it was not offered to induce him not to vote. It ought not to be implied that a document means a particular thing, unless the contrary would be repugnant to it. Here, it is said, the document implies, "If you will vote for Lord Maidstone and Mr. Slade;" but would there be any repugnancy had it run thus—"You are requested to return and vote for Lord Maidstone and Mr. Slade; your railway expenses will be paid if you come in pursuance of this request, whether you vote or not?" I think not. It is also to be remembered that one construction makes the document innocent, the other makes it guilty. If the letter is evidence of a conditional, and, consequently, as I think, of an illegal promise, I cannot see what evidence there is that the defendant authorized it. He did not do so in terms, and all he did from which authority is inferred was to say, it is legal to pay travelling expenses. In that opinion I agree, and I cannot, therefore, see how it gives authority to make an unlawful promise, nor do I believe, for the reasons I have given, that a candidate would be likely to make a conditional promise. I presume candidates have a well-grounded expectation that voters in their interest will vote for them if they come, or if not, that they will not ask for their expenses. I do not understand that this point was taken at *Nisi Prius*, though the form of the exception comprehends it. I do not understand, therefore, that an opinion was expressed on it there, so that I approach the consideration of this question without feeling that the ruling there is an authority against this opinion. And I think, with all respect, that those opinions now entertained to the effect that the promise was conditional, and that there was authority so to make it, are based on the supposed improbability of a candidate undertaking to pay the travelling expenses of a person who should not vote for him. This view, I think, a mistake, and that it confounds an expectation with a condition. I, therefore, answer all your Lordships' questions in the negative.

WILLES, J.—My Lords, I am of opinion that, assuming the letter of the 12th of August, 1854, to have been written and sent to Carter by the direction and authority of the defendant in error, there was evidence for the jury that the defendant was guilty of bribery within the true intent and meaning of the 2d section of the 17 & 18 Vict. c. 102.

The letter was as follows:—

"Cambridge Borough Election Committee-Room, Lion Hotel, 12th August, 1854.

"Sir,—The mayor having appointed Wednesday next for the nomination, and Thursday for the polling, you are earnestly requested to return to Cambridge and record your vote in favour of Lord Maidstone and F. W. Slade, Esq., Q. C. Yours truly, CHARLES BALLS, chairman.

"Your railway expenses will be paid."

The bare reading of this letter, coupled with the circumstances under which it was written, satisfies my mind beyond a doubt that it was, and was intended to be understood as a promise to pay the railway expenses of the voter, if he voted for the named candidates. The expenses were not to be paid for doing nothing. Then for doing what were they to be paid? Of course, for doing what was asked, namely, returning to Cambridge and voting for the named candidates. There is nothing to limit the condition to returning to Cambridge merely. Either, therefore, the

consideration for payment of the travelling expenses was the voter returning to Cambridge and voting, or at least doing his best to vote, for the named candidates; or the voter's expenses were to be paid though he did nothing or did the contrary. But the latter construction was not likely to suggest itself to the mind of the voter; and it savours, to my apprehension, of that excessive subtlety which is reprobated and disallowed of in law.

The question, therefore, is, in effect, whether a promise to a voter of his travelling expenses, conditionally on his voting for the candidate who makes the promise, is bribery within the 2d section of the statute. I am of opinion that it is.

That section describes the persons who shall be deemed guilty of bribery under several heads. The first of those heads is as follows:—“Every person who shall directly or indirectly, by himself or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure or to endeavour to procure, any money or valuable consideration, to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any election.”

The whole section is subject to a proviso in the following words:—“Provided always, that the aforesaid enactment shall not extend or be construed to extend to any money paid or agreed to be paid for or on account of any legal expenses *bonâ fide* incurred at or concerning any election.”

Now, it is clear that a promise of “travelling expenses” is a promise of “money,” and so within the words of the act, which must, therefore, be construed as including it, unless to do so would lead to some manifest absurdity or incongruity with the rest of the statute, showing that such could not have been the intention of the legislature.

I see no such absurdity or incongruity, but the contrary. A voter who will obtain his travelling expenses if he vote for A., but not if he vote for B., has, when at the polling-place, a direct pecuniary inducement to vote for A.; and a person who promises to pay expenses upon such a condition creates that inducement. If it be said that this may and practically will be counterbalanced by B.'s making a similar promise, I answer that B. is not bound to do so—may not be able, or if able, willing to bear the expense,—and if he do not, the longer purse or greater profuseness of A. may prevail. Besides, bribery is not the less bribery because each candidate offers the same sum to those who vote for him. Moreover, if the payment of travelling expenses were allowed, there would be danger of such allowance being made a cloak for bribery. There is no reason why, if a man is to be repaid his disbursements because he has expended money, he should not also be remunerated for the inconvenience and loss of time he sustains in coming to the poll. But what a door this, if allowed, would open to abuse!

Whatever be the better opinion upon the justice of such payments as between the candidate and the voter, it may well have been the intention of the legislature to forbid them, as being very likely to engender corrupt practices, the more dangerous because of their being plausible.

I cannot find anything in the statute inconsistent with such an intention.

As to the proviso at the end of the 2d section, in my opinion it obviously refers to the expenses of the candidate, not those of the voters, and so is inapplicable to the present question.

Therefore, construing the act according to its express terms, and "so as to suppress the mischief and advance the remedy," I answer the first and most important question in the affirmative.

As to the second question, I am of opinion that there was evidence for the jury that the letter in question was written and sent by the direction and authority of the defendant in error.

That letter was sent from the committee-room of the defendant, and with the exception of the words "your railway expenses will be paid," it was a printed circular, requesting votes. Those words were added in writing by Thirkettle, the clerk of Peed, who was the agent of the defendant for election expenses. No sound distinction can be made upon the facts between Thirkettle and Peed. The evidence is clear that Peed sanctioned what his clerk did; and the true question is, whether what passed between the defendant and Peed upon the subject of travelling expenses authorized the latter to add to the circular words promising payment of railway expenses conditionally upon the voters giving their votes on his side.

The evidence upon that point is in substance this:—There was a joint committee for conducting the election of Lord Maidstone and the defendant. The question of travelling expenses was discussed in the committee-room in the defendant's presence. In the course of that discussion the defendant (after referring to an opinion of Chief Justice Tindal, according to which, if applicable to the existing statute, travelling expenses might legally be paid to induce the voter to vote, and speaking for the guidance of Peed, and in answer to a question put by him), said, that it was legal to pay travelling expenses "to bring up out-voters." That was not an abstract proposition of law, but a statement intended to be acted upon for the purposes of the election. It necessarily implied an authority to inform the out-voters that their railway expenses would be paid if they came up, because otherwise the payment could not operate "to bring them up." Well, then, what did the defendant mean by "bring up?" Was it merely to induce the voters to come to the place of polling and not vote at all, or come there and vote for the rival candidates? These suppositions are possible, but (I speak mildly) improbable in a high degree, because plainly inconsistent with the object for which the defendant was striving, namely, to get votes for his side. There only remains one other construction of "bring up," namely, induce to come to the poll and vote in favour of the particular candidate. If this, the only probable view, be adopted, there was authority to communicate it to the voter, which is all that the letter in question does. That the defendant authorized Peed to communicate to the voters in some form, in order "to bring them up," that their railway expenses would be paid, in some sense, is certain. It was improbable, under the circumstances, that the candidate should intend to pay the expenses of persons who voted against him or not at all, and at least, therefore, it was for the jury to say whether, in their judgment, the more probable and rational view of the case and that acted upon by the

defendant's agent in the matter, was not the true one, namely, that the candidate intended the out-voters to be informed that they would be paid their railway expenses conditionally if they voted on his side.

As a difference of opinion exists upon this question, I may be excused for referring to an authority in support of the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict. I find such an authority referred to in Mr. Best's very able and instructive Treatise on the Principles of Evidence (2d edit. 114). So long since as the 14th of Elizabeth, Chief Justice Dyer and a majority of the other Justices of the Common Pleas laid down this distinction between pleadings and evidence, "that in a writ or declaration or other pleading certainty ought to be shown, for there the party must answer to it, and the Court must adjudge upon it; and that which the party shall be compelled to answer to, and which is the foundation whereon the Court is to give judgment, ought to be certain, or else the party would be driven to answer to what he does not know, and the Court to give judgment upon that which is utterly uncertain. But where the matter is so far gone that the parties are at issue, or that the inquest is awarded by default, so that the jury is to give a verdict one way or the other, there, if the matter is doubtful, they may found their verdict upon that which appears the most probable, and by the same reason that which is most probable shall be good evidence:" *Newis v. Lark*, Plowden, 412. For these reasons I answer the second question in the affirmative.

In answer to the third question, I am of opinion that there was evidence that the defendant corruptly paid money to Carter on account of his having voted at the election. I think the word "corruptly" in this statute means, not "dishonestly," but in purposely doing an act which the law forbids, as tending to corrupt voters, whether it be to give a pecuniary inducement to vote, or a reward for having voted in a particular manner. Both the giver and the receiver in such a case may be said to act "corruptly." The word "corruptly" seems to be used as a designation of the act of rewarding a man for having voted in a particular way as being corrupt, rather than as part of the definition of the offence. I agree with what was said by the learned Judge at the trial, that if the moving cause of giving the money is the voter having voted for the particular candidate, such gift is contrary to the statute, as being given by way of reward for the vote, and therefore corrupt. This may exclude cases in which money is given from purely charitable motives, though to a voter; but in the present case no other probable motive besides the vote upon the defendant's side itself appears or can be suggested.

The third question in this case may upon the special facts also be disposed of upon narrower grounds, as follows:—A promise forbidden by law as tending to corruption having been made by the defendant's agent, to pay money to Carter if he would vote as he did vote, such money, when subsequently paid to him by the defendant's agent accordingly, was paid in pursuance of a forbidden promise, the only consideration for which was a vote influenced thereby, and therefore, in the sense already explained, it was paid "corruptly." And if the answer to the second question be right, that there was evidence of authority to write

the letter, there was, of course, evidence of authority to make the payment promised therein.

I thus answer all the questions in the affirmative.

CROMPTON, J.—My Lords, I think that assuming the letter in question to have been written and sent by the direction of the defendant in error, there was evidence of bribery within the meaning of the late statute.

That letter, under the circumstances stated in the bill of exceptions, seems to me to amount to a promise that the railway expenses should be paid to the voter if he voted for the candidates named in the letter. He is requested to come to Cambridge, and to vote for the specified candidates, and told that his railway expenses will be paid. And I do not think it consistent with any fair and reasonable construction to suppose that any man could understand that his railway expenses were to be paid whichever way he voted.

Neither do I think that the offer could mean, as suggested, that conveyances would be secured by railway, or that the letter referred to prepayment of the railway fares by the candidates, leaving the voter to vote as he pleased. No arrangement appears to have been made for providing railway carriages by the candidates, and the arrangement acted upon was, that the voter should pay for himself and afterwards receive back the money; and the expression in the letter seems to me to refer to a repayment of the expenses incurred by the voter.

It was urged in argument that the money could not be a gift within the statute, because, as it was said, there was a consideration for the repayment by reason of the payment or expense incurred by the voter being at the request of the party making the promise, and subsequently paying; and it was contended that a payment of a sum of money due for a valuable consideration would not be within the statute. This doctrine would, however, as it seems to me, go much further than could possibly be supported. It would, for instance, include a payment as a remuneration for loss of time, if a voter should, at the request of the candidate, abstain from work that he might come to vote for him.

It was said also, that the voter really gets nothing, and if he could recover the money as a sum laid down by him for the candidate, at the candidate's request and as the candidate's money, so that the candidate would be liable to repay the amount whichever way the voter voted as money paid by the voter for the use of the candidate at his request, the case would be much the same as if the candidate had provided travelling accommodation for the voter, and it would be necessary to consider how far such providing travelling accommodation would be legal; but according to what I think the true construction of the letter the money was not to be paid by the voter as the agent of the candidate, to be repaid back at all events; but I think the real agreement was, "If you vote for us, we will pay you the money you have expended for travelling expenses, which, in the event of your voting the other way, will fall upon yourself." And this seems within the principle which requires that the voter's mind should be left unbiassed to the last, and within the enactment of the statute as to the promise of money. Part of the consideration for which the money is to be paid is the voting for the particular candidates, and the promise is, therefore, to give money for so

voting. I answer your Lordships' first question, therefore, in the affirmative.

With regard to the second question, I think that there was evidence for the jury that the letter was written and sent by the authority and direction of the defendant.

It appears that a discussion took place at the committee as to the question of travelling expenses, and that the defendant gave his opinion for the guidance of the parties who were conducting such matters. The "guidance" must surely mean the guidance with reference to what they were to do as to getting up the out-voters and paying their travelling expenses.

It appears that Peed had asked the defendant whether it would be legal to get up the out-voters and pay their legal travelling expenses, "what they had paid out of pocket," so that it is clear that the conversation and advice had no reference to any plan of providing carriages for out-voters, but that it referred directly to the repayment to out-voters of the money they had paid for their travelling expenses. It seems to me that it is hardly consistent with any reasonable probability to suppose that the out-voters, so to be brought up and repaid, were to be repaid whichever way they voted, or that the conversation had any reference to the bringing up out-voters who were to vote or might vote for opposing candidates. I think that the circumstances stated to have taken place at the committee-room were at all events evidence of the defendant giving his sanction, direction, and authority that the course which was adopted should be taken, and if so, the payment afterwards seems to have been in conformity with the letter and promise, and to have been the act of the defendant through his agent.

I answer your Lordships' second and third questions, therefore, also in the affirmative.

WILLIAMS, J.—My Lords, I am of opinion that all the questions put by your Lordships ought to be answered in the affirmative.

As to the first of these questions, the 2d section of the statute 17 & 18 Vict. c. 102, enacts, that a man shall be deemed guilty of bribery "if he shall promise any money" "to any voter" "in order to induce him to vote."

The letter to which this question adverts appears to contain an implied promise to the voter, namely, the amount of his railway expenses, if he shall have incurred them by reason of acceding to the request contained in the letter, viz., to "return to Cambridge and record your vote in favour of Lord Maidstone and F. W. Slade, Esq." And with respect to the motive of the promise, I am wholly unable to understand how any doubt can be entertained that the promise was made simply in order to get the voter to come to Cambridge and vote for Lord Maidstone and Mr. Slade; or, in the words of the statute, "in order to induce him" ("any voter") "to vote."

As to the proviso in the statute that the enactment shall not extend to any money paid or agreed to be paid for or on account of any legal expenses *bonâ fide* incurred at or concerning any election, I agree with my Brother Willes, that it refers to the expenses of the candidate, and not those of the voters, and is quite inapplicable to the present question.

As to the second of your Lordships' questions, I beg to call your

attention to that part of the evidence of William Thirkettle which speaks of the transaction in the committee-room of Lord Maidstone and Mr. Slade. The persons present there were Mr. Slade, Mr. Peed, and the witness. Mr. Peed was Mr. Slade's "agent for election expenses," appointed by him in obedience to the statute, and who alone (by the 31st section) had authority to expend any money or incur any expenses of or relating to the election. The witness was Mr. Peed's clerk. Mr. Peed requested that for his guidance Mr. Slade would give his opinion, whether it was legal to pay travelling expenses to bring up the out-voters; and accordingly Mr. Slade, after consulting a law book, and reading therein the opinion of Tindal, C. J., gave Mr. Peed his own opinion that such travelling expenses might be paid, saying, he thought it was legal to pay merely the expenses out of pocket. And after this had been said, the witness wrote the words, "Your railway expenses will be paid," at the bottom of the letter to Carter.

It was hardly denied, on the part of the defendant in error, that this, together with the other facts of the case, afforded some evidence that he had authorized his agent to write to the out-voters, promising to pay their travelling expenses. But the main contention was, that he did not authorize a letter containing a promise to pay them conditionally on the voter's voting, and made to induce him to vote. But I am of opinion that the language of Mr. Slade was such, that a jury might well infer from it an authority to make on his behalf the promise which I have already had occasion to say I think is to be implied from the letter sent to Carter, viz., a promise to reimburse the voter for any travelling expenses he should incur in coming to Cambridge to vote for Lord Maidstone and Mr. Slade. It seems to me that there can be but one answer to the question why Mr. Slade expressed his deliberate opinion, for the guidance of his election agent, on the point whether it was legal to pay travelling expenses to bring up the out-voters. It surely was that it might be acted on in order to induce them, by relieving them of those expenses, to come up and vote for him. And as his opinion could only effectually be acted on by letting the out-voters know that they would be so relieved, I think a jury might well infer an authority from Mr. Slade to take that course on his behalf.

As to your Lordships' third question, the answer to it necessarily follows from the answers I have given to the first and second; for, if the defendant authorized the making a promise to pay contained in the letter of the 12th of August, 1854, it is plain that he also authorized the performance of that promise; and the money so paid was, in my opinion, corruptly paid; because it was paid in performance of a promise which the statute says shall be deemed bribery.

WIGHTMAN, J.—In answer to your Lordships' first question, I am of opinion that, assuming the letters of the 12th of August, 1854, to have been written and sent to Carter by the direction and authority of the defendant in error, there was evidence for the jury that the defendant was guilty of bribery within the true intent and meaning of the 2d section of the 17 & 18 Vict. c. 102.

The answer to this question turns upon the meaning to be attributed to that letter. If it was an unconditional promise to pay Carter's railway expenses, it would not, in my opinion, be evidence that the defendant was guilty of bribery within the meaning of the Act; but if it was

a promise to pay Carter's railway expenses "if he recorded his vote in favour of Lord Maidstone and the defendant," and upon that condition only, then I think it would be evidence of a promise of money to a voter to induce him to vote for Lord Maidstone and the defendant, and in that case evidence for the jury that the defendant was guilty of bribery within the meaning of the 2d section of the Act. The mere promise to pay the railway expenses of a voter may not be evidence for the jury that the person promising was guilty of bribery, unless it also appears that the promise was given in order to influence the vote; as the 2d section of the Act, in order to bring a promise to pay money to a voter within the definition of bribery, requires the promise to be in order to induce the voter to vote or refrain from voting. If the words of the section are taken literally, a promise of money to a voter to induce him to vote at an election, though without specifying or intending that he should vote for a particular candidate, would be within the definition of bribery in the 2d section; but giving a reasonable construction to the Act, it must, I apprehend, be understood to mean, that to constitute the offence of bribery the promise must be to induce the person to whom the promise is made to vote for a particular candidate. Any one who reads the letter in question may well be of opinion that the postscript was added to induce Carter to come to Cambridge and vote for Lord Maidstone and the defendant, by a promise that his railway expenses should be paid; and if so, it was evidence for the jury that the defendant was guilty of bribery within the meaning of the 2d section of the statute, assuming that it was written and sent to Carter by his direction and authority.

In answer to your Lordships' second question, it appears to me that there was no evidence for the jury that the letter in question was written and sent by the direction or authority of the defendant. It may be that the defendant was aware of the printed circular proposed to be sent to the voters, and that there was authority from him to send such circular to urge their coming to Cambridge. But the question is, whether there is any evidence of the postscript being added in manuscript by the direction or authority of the defendant. It is the postscript which contains the promise; but all the evidence relating to it is, that before the postscript was written by the witness Thirkettle there was a discussion in the defendant's presence, whether it was legal to pay travelling expenses to bring up the out-voters; and that the defendant was asked, whether it would be legal to get up the out-voters, and pay their legal travelling expenses, what they paid out of pocket, and he answered that in his opinion it would. This was all that passed; and upon this, and as far as it appears, without the knowledge or concurrence of the defendant, the postscript was added by Thirkettle. Throughout the whole there is no evidence of any discussion as to any promise to pay travelling expenses, nor that the defendant was consulted about or knew of, still less that he authorized the making of any precedent promise that such expenses should be paid. I therefore answer your Lordships' second question in the negative.

With respect to the third question proposed by your Lordships, if there had been any evidence that the defendant knew of the postscript to the letter, the subsequent payment of the money, with his concurrence, would be evidence of a corrupt payment of money to Carter on

account of his having voted at the election; but unless there was evidence that the defendant knew of the precedent promise, the mere repayment of the railway charges for bringing the voter to Cambridge was not a corrupt payment of money to a voter on account of his having voted at the election, within the meaning of the Act of Parliament.

COLERIDGE, J.—My Lords, I am of opinion that, upon the assumption made in your Lordships' first question, there was evidence for the jury that the defendant was guilty of bribery within the true intent and meaning of the 2d section of the 17 & 18 Vict. c. 102. This must mainly depend on the proper construction of the letter signed by the chairman of the committee. The subject of that letter was not merely the return of Carter to Cambridge, but the return and the voting for the candidates named. And it seems to me that any reasonable person receiving that letter must have understood, and that it was intended he should understand the promise to pay his election expenses as made conditionally only on his voting for them, as well as returning to vote. To have asked for the payment, if he had not so voted, all persons would have thought unreasonable and impudent, and it would certainly have been unsuccessful. This, then, was a promise of money in order to induce a voter to vote; and whether the payment of travelling expenses, per se, be legal or not, I am clearly of opinion that to promise to do so, in order to induce a voter to vote, is within the 2d section of the statute.

Secondly, by "evidence for the jury" in this question, I understand any such evidence as the jury might reasonably found their verdict on; and so understood, I answer the question in the negative. The record shows that the circulars, of which the letter in question was one, had been prepared and printed in a perfectly unexceptionable form, and signed by the chairman. That which I call the promise, was added in manuscript by the clerk to the defendant's agent for election expenses; merely as such clerk. I think he had no implied authority from the defendant to do so, nor had he any direct authority either from the agent or the defendant to do it. But according to his own account he did it because there being a discussion as to the legality of paying the travelling expenses of out-voters in the presence of the defendant, and the defendant, being a lawyer, having been referred to for his opinion, he had consulted a law book, in which appeared to be an opinion of Chief Justice Tindal on the point, and then expressed his own, that such expenses were legal, and that nothing beyond such was to be paid. After the vote given, the agent himself authorizes the election auditor to pay a sum admitted to be the bare legal expenses. These are all the material facts.

Now, upon these the defendant may be taken to have authorized the payment of travelling expenses, because he says beforehand they may be paid, that it is legal to do so, and his agent for expenses afterwards in effect makes the payment. But unless the mere payment and the promise to pay in order to procure the vote are the same thing, or unless there be reasonable grounds from the evidence to impute to the defendant that he intended to convey to those present more than he expressed (of which I certainly see none), he, the defendant, clearly has furnished no evidence of authority, directly or indirectly given, to do more than to pay the expenses. Now, in my opinion, this is not the same thing with a promise to pay in order to procure a vote. The one

I have already said I consider to be illegal; the other, simply and by itself, I look upon as legal, becoming only illegal when done corruptly. My reasons for this latter opinion will be stated in my answer to your Lordships' third question.

Thirdly, I have already stated my opinion that there was evidence that the defendant paid money to Carter on account of his having voted at the election; and the learned Judge who tried the cause is stated to have been of opinion that this was equivalent to his having paid the money corruptly. According to his view of the statute, the word "corruptly" is purely superfluous and otiose, for he expressly tells the jury that they ought to find for the plaintiff, if they were satisfied that the money was given by or for the plaintiff, and that the moving cause for the gift was that Carter had voted for the defendant, even though the amount was no more than the fair and reasonable expense incurred, and though the defendant honestly believed he was committing no offence thereby. No one can entertain a more sincere or greater respect for the author of that opinion than I do, nor venture to differ from him with greater diffidence; but after much consideration, I cannot but think that the judgment of the Court below, which is opposed to this ruling at *Nisi Prius*, stands on sounder foundations. The word "corruptly" certainly was not inserted in the statute without a purpose; twice in the section, in branches 1 and 2, it is omitted in the first parts, which relate to promises and agreements to procure future votes; twice it is inserted in the latter parts, where the reference is to votes having been given or withheld at the election past. For the omission in the former and the insertion in the latter many good reasons may be assigned; it is enough to say, that a promise to pay money or to procure a place to induce a voter to vote for a particular candidate, can only be made with a view to influence the voter's mind, and interfere with the independence of the vote. However laudable the motive in the mind of him who promises, or whatever his knowledge of the law, the act is against the policy of the statute, and within the mischief to be prevented; the statute is, therefore, framed to prevent the act under all circumstances. But to give money or procure place on account of the vote having been given or withheld after the election may or may not be within the mischief which the act was intended to prevent, or it may be done under circumstances which so remotely tend that way, that the legislature may well have declined to make it penal under all circumstances. Some such were mentioned in the judgment in the Court below; others will readily occur to the mind. It appears to me, then, that it is material to bring an act within this part of the section, that it should have been done "corruptly," and that whatever may be required to satisfy that word, the merely doing it because the vote had been given or withheld is not enough. As a general rule, no doubt, the party's knowledge of the law is immaterial, or perhaps is to be conclusively presumed; but here the statute expressly makes the operating motive in the mind of the party material, and it adds that that motive must be corrupt; which is as much as to say, that it may operate honestly and without intent to interfere with the purity of election.

Now, in the present case, nothing is found which affects the defendant, but that he expressed an opinion, founded on that of a great Judge, that such a payment, confined within very strict bounds, might be made.

This might not have protected him if evidence of a corrupt motive had been given; but to make it in itself evidence of corruption seems to me against candour and the proper construction of the statute. I think, therefore, that this question ought to be answered, like the second, in the negative.

April 17.—Lord CRANWORTH (after stating the nature of the action, and the words of the section of the 17 & 18 Vict. c. 102, on which it was founded).—There had been several counts in the declaration, but they were all abandoned, except the seventh and eighth. The former count alleged, that after the passing of the Act the defendant promised to one Richard Carter, a voter, money, to induce him to vote at the said election; and the latter count alleged, that the defendant gave the money to Carter, he being such voter, and having voted at the election. The facts, as proved at the trial, were these—[his Lordship stated them.] The first question was, whether, if the payment of Carter's expenses was made with the authority of the candidates, it constituted bribery, within the statute. If so, then the question arose, whether that payment was made by their authority. As to the first of these questions, he never had been able to entertain a doubt about it. Giving money to a voter to come and vote for a particular candidate was giving him money within the meaning of this section, and of previous sections to the same effect. It might be a matter for the two Houses of Parliament to consider, whether it would not be reasonable to alter this enactment, so as to allow the payment of bona fide expenses; but at present, this section did not allow it.

There was no doubt that, in point of fact, the payment was made.

Then came the question, whether it was made by the authority of the defendant? The evidence on that point was this—[his Lordship stated it.] On that he thought there was no possibility of coming to any other conclusion, than that it was done by the authority of the defendant. His opinion as to the legality of the payment was not only given, but it was given "for the guidance of his agent." When, therefore, that agent made the statement in writing at the bottom of the note, he made it expressly on the authority of the defendant. If the candidate believed that the travelling expenses might legally be paid, it was but natural that he should cause the out-voters to be informed of the fact. The only error that appeared in the case was, that there was not evidence which warranted a finding upon both counts, for, though there was a corrupt payment within the meaning of the statute, still the legislature did not intend that two penalties should be recovered; for the promise to pay the money and the payment of it could only constitute one act of bribery. The Judge's direction to the jury, to consider whether "the defendant did by himself, or by any other person on his behalf, authorized by him so to do, promise money to the said Richard Carter, in order to induce him to vote for the said defendant," was a right direction. It was also right for the Judge to tell the jurors, that "if they were satisfied upon the evidence that the defendant did by himself, or by any other person on his behalf, authorized by him so to do, give money to the said Richard Carter on account of, that is to say, that the moving cause of his giving such money was, Carter's having voted for the defendant, that they should find the eighth count for the defendant. Both these directions were right, but only one penalty could be recovered.

The exception, however, had not properly been directed to that point, and so a *venire de novo* would not be the proper mode of proceeding. The plaintiff, it appeared, was willing to enter a *nolle prosequi* upon either of these counts, and that being so, judgment must be entered for the plaintiff, but upon one count only.

Lord WENSLEYDALE had but few observations to make upon this case in addition to those of his noble and learned friend. The principal object of the action was to take the opinion of the Court, and, if necessary, of a Court of error, on the construction of a recent act of parliament, and therefore it did not appear necessary or proper that so many penalties should be enforced. He had, as the Judge who presided at the trial, delivered his own opinion that the act of parliament had been violated, and in that way he enabled the parties to bring the question before the Supreme Tribunal. He had felt no difficulty in giving his opinion that, according to the true meaning of the act of parliament, a promise of a sum of money, though that money might be the legal expenses of the voter coming to vote, if given, in order to induce any voter to vote or refrain from voting for a particular candidate, was within the act of parliament. He had also felt it necessary to give a like opinion upon the other count, in which it was charged that the defendant had given or caused to be given a sum of money to the voter for having voted at the last election. He certainly did so with some hesitation, as he did not exactly know the meaning of the term "corruptly" as used in that Act of Parliament, but he was certain that the Legislature could not mean to impose two penalties for the same thing, namely, one for the promise to give, and the other for the giving of the money. It occurred to his mind that the reasonable construction to be put upon the act with regard to the giving of money after voting, where there had been no previous promise to give the money as an inducement to vote, was, that that must be a corrupt payment within the meaning of the act. He had not been, however, perfectly satisfied with that opinion. Still, he had thought that that was the most reasonable construction to be put upon the act, and he had put that construction upon it, believing that his opinion would be, as it since had been, subjected to review. Now, with respect to the first proposition, that every payment of legal expenses to a voter in order to induce him to vote, every payment, upon any condition expressed or implied, that he should be paid his expenses if he voted for any particular candidate, was bribery within the meaning of the Act of Parliament, appeared to admit of no doubt at all; it was admitted in all the courts below and here. Whether the evidence to support that charge was sufficient had not been debated at *Nisi Prius*, and he never expected it to be made a matter of dispute. Had the question then been raised it would have been fully sifted, and would have been left to the jury, with proper observations. Yet that was made a principal point in the argument in the Exchequer Chamber, though it was hardly so fit to be made the subject of discussion on a bill of exceptions as on a motion for a new trial or by a demurrer to the evidence. However, he should now proceed to discuss this question. Two others were involved in it. First, whether any such promise was held out by anybody to Carter. That depended on the letter sent from the defendant's committee-room, and signed by the chairman of his committee. The letter contained an invitation to the voter to come to

Cambridge and vote for Mr. Slade and Lord Maidstone. The postscript said, "Your expenses will be paid." There could be little doubt that this meant that the voter's expenses would be paid if he did what he was thereby required to do. Among the learned Judges, with the exception of Bramwell, B., no doubt appeared to be entertained on this question. Then came the more important question, whether this letter could, for the purpose of this action, be traced to the defendant or his agent. As the act was done by the agent, and was in itself illegal, the principal could only be held responsible on proof that the agent had acted on the express or implied authority of the principal in doing it, or that the principal had ratified the act after it was done, or had appointed the agent to do all acts, legal and illegal, which he might think proper to support the interest of the candidate. It, therefore, became necessary here to show that the letter was written by the authority, express or implied, of Mr. Slade, or that he had ratified it. On that point there was a difference of opinion among the Judges, but he concurred with the majority that there was such evidence, and the jurymen, who had the best opportunity of estimating the value of the evidence, came to that conclusion. In *Siboni v. Kirkman*, 1 Mee. & W. 418,† S. C. 5 Law J. Rep. (N. S.) Exch. 212, the difference between seeing and hearing the witnesses and reading the depositions, was remarkably shown. That was an action upon a special agreement for the non-delivery of a piano. A special agreement was set up in answer, and the cause was tried. The Court of Exchequer thought that there was error in the direction, and a new trial was ordered. The witness for the defendant stated a perfectly good case at first, but upon her cross-examination she utterly contradicted or qualified everything she had before said, so that he directed the jury that there was no evidence in support of the plea. A bill of exceptions was tendered, and the Court of Error said that the direction was wrong, because the jurors were the judges of the evidence, and it was for them to say whether, on the whole, she had proved the case or not. These circumstances did not appear distinctly on the case as reported, but he recollected them perfectly, and had a note of them to that effect, and the case was a strong exemplification of the principle that it was for the jury to consider and put a value on the testimony of the witnesses. He applied that reasoning to the present case, and asked whether the jury here might not consider the evidence to make out that the promise was made and the money given on the authority of Mr. Slade.—[His Lordship here referred at large to the evidence, and intimated that it was his opinion that the jurors had done right in saying that the defendant meant to authorize the very thing which was done.]—It mattered not, for this purpose, whether the defendant thought he was acting rightly or not. There was every reason to believe that he thought he was, and relied on Tindal, C. J.'s, opinion, but the fact was that he had authorized the promise and the payment of these expenses, and each of these things was contrary to statute. There was, therefore, sufficient evidence to affect the defendant with the illegal act; there was no well-founded doubt upon the construction of the statute, and the judgment of the Court below must, therefore, be reversed, and (after what had taken place with regard to the two counts) judgment must be entered for the plaintiff, on one count of the declaration.

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T., by her will, desired that a sum of 500*l.*, lent by her to the defendant, should be allowed to remain in his hands during the life of her sister, he paying the interest to her sister, but that on her sister's death T.'s executors should collect the 500*l.* and divide it between her two nieces, one of whom was the plaintiff, and the other the defendant's wife, the same to be for their sole and separate use respectively, free from the control and debts of any husband, with benefit of survivorship, &c. During the lifetime of the tenant for life, the plaintiff's husband took from the defendant his acceptance for 242*l.*, payable in twelve months, as and for the share of the plaintiff's wife in the legacy. The plaintiff and her husband, and the defendant and his wife, signed a receipt to the executor of T.'s will as and for a receipt of the legacy of 500*l.* But no money ever in fact passed; the 500*l.* was never collected from the defendant; the acceptance was never negotiated; and, on the death of the plaintiff's husband, the defendant procured a return of it to him. Again, the plaintiff's father by his will bequeathed to her the proceeds of a life policy, and made the defendant his executor, who, acting in that capacity, received 200*l.* upon the policy. Afterwards, and after the death of the plaintiff's husband and the defendant's wife, the plaintiff claimed from the defendant pay-

ment of the two sums of 242*l.* and 200*l.*, and a further sum for money lent by her to him. At an interview between them, in the presence of the plaintiff's attorney, the defendant dictated, and the attorney wrote out, a memorandum, by which the defendant charged himself with the two sums of 242*l.* and 200*l.*, and the item for money lent, and with interest from the date of the death of the plaintiff's husband. At the same interview he mentioned certain claims of his against the plaintiff's husband, and asked whether he could set them off, but did not enter them in the memorandum. He also afterwards, at the same interview, signed on the back of the memorandum an authority to his attorney to pay the plaintiff the amount due to her out of any moneys that might be received on his account, referring verbally to an intended sale of some property on his behalf. At the trial no evidence was given of any set-off.

In an action on the common counts, it was objected that the 242*l.* had been reduced into possession by the plaintiff's husband, and therefore she had no right of action at law in her personal capacity, and that the 200*l.* was held by the defendant as executor, and therefore he could not properly be sued in his personal capacity, and that the memorandum and authority taken together were not, under the circumstances, a statement of an account as due in presenti. Held, that the jury were justified in finding that the memorandum was a statement of account, sufficient to entitle the plaintiff to maintain her suit in respect of both the sums. *Topham v. Morecraft*, 972

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After the issuing of a writ in an action on a common money bond, the defendant wrote, stating that he had paid a part and could prove this, and that he was ready to pay the rest. The attorney for the claimant did not apply for an order of reference under sect. 3 of the Common Law Procedure Act, 1854, but delivered a declaration, to which the defendant pleaded payment. When the cause, after a considerable lapse of time, was in the paper for trial, a judge's order was obtained by consent to refer the matter to the Master to take the account; and he made his allocatur in favour of the plaintiff for debt and costs. After the letter was written, and before the allocatur was made, the defendant became bankrupt. In an action brought by the attorney for the plaintiff, against the plaintiff, on his bill, and in a cross action for negligence, the attorney admitted in evidence that the section did not occur to his mind on reading the letter, and that he could not say that the section ever came to his memory. Held, dissentiente Lord Campbell, C. J., that there was no evidence of negligence on the part of the attorney in not applying for an order under the section; for that it could not fairly be said that it would have clearly appeared to any reasonable person that the matter in dispute consisted either wholly or in part of matters of mere account which could not conveniently be tried by a jury. *Chapman v. Van Toll*, 396

BANKER.

Bond to banking Company by two obligors, one a customer: equitable plea by the other of release, to an action against him by the Company.

Defendant executed a bond for 2000*l.* to a banking Company; the condition whereof recited that C. kept an account with the Company; and it was declared that, if C. or defendant, or either of them, should on demand pay to the Company all sums, not

exceeding in the whole 1000*l.*, which should from time to time be due to the Company by C., with interest, the bond should be void.

The Company sued defendant on the bond, alleging, as a breach, that on 30th June, 1856, there was due from C., as the balance of his account, 996*l.* 12*s.* 11*d.*, which had not been paid by C. or defendant, though duly demanded, and a further sum for interest.

Equitable plea: That the bond was executed by defendant solely as surety for C., and so accepted by the Company: and that, by reason of various verbal and written communications between defendant and the Company, before and at the time of execution, the liability of defendant, and the advances to C., which were to be secured, were limited to 950*l.*; and defendant was to be informed if the account, with interest, should reach 1000*l.* and not be reduced within a month; and defendant became surety on such terms only: but the Company, on each of several occasions, made advances beyond 950*l.*; and on each of several occasions the account against C. exceeded 1000*l.* and was not reduced within a month, and defendant was not informed: whereby defendant became absolutely released from liability and entitled to equitable relief.

The Company took issue on the plea, and also replied over; and defendant took issue on the replication. On a special case, giving the Court power to draw inferences of fact, it was stated that, previously to the execution of the bond, the defendant objected, by letter, to becoming liable for interest upon an advance of 1000*l.*, and requested to know whether the 1000*l.* was to include interest. In answer, the Company informed defendant that the bond was for 1000*l.* with interest, but that there was little chance of its exceeding that sum for any length of time, as the Company, if it should be over the amount, including interest, at the half-yearly balance, would require it to be reduced to 1000*l.*, or would limit the amount to 950*l.*, which would leave a margin for interest. Afterwards, the Company executed a memorandum, to the effect that C.'s advance should be limited to 950*l.*, and defendant be informed if the account, with interest, should reach 1000*l.*, and not be reduced in a month. At this time the advance exceeded 950*l.* Defendant then executed the bond. Afterwards, the limit of 950*l.* was on many occasions exceeded. Also, on three occasions, the amount of 1000*l.*, interest included, was slightly exceeded, and not reduced within a month, and defendant was not informed of it. Also, at one half-yearly balance, the amount was 1004*l.* 10*s.* 1*d.*, but was reduced by 12*l.* in two days after.

Held, that the effect of the agreement was, not that the defendant should be discharged from liability upon the limit being exceeded, but that 950*l.* should be considered as substituted for 1000*l.* in the condition. *Gordon v. Rae*, 1065

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BANKRUPT AND INSOLVENT.

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Where an execution-creditor, under stat. 1 & 2 Vict. c. 110, s. 36, petitions the Court for the relief of insolvent debtors for a vesting order against a defendant charged by him in execution, that Court has, under stat. 10 & 11 Vict. c. 102, s. 10, power to make an order referring such petition to a judge of a county court, as well as in the case of a petition by the insolvent. *Regina v. Dowling*, 605

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III. Adjournment, sine die, of an adjudicated bankrupt's application for discharge; not a declining of jurisdiction by the judge.

M. was adjudicated bankrupt, but did not surrender. Afterwards he petitioned the Bankruptcy Court to be allowed to surrender: but, he not having appeared to support his petition, it was dismissed with costs, for which, by virtue of an order of the Bankruptcy Court, he was taken under a ca. sa. Afterwards, he petitioned the Bankruptcy Court again to be allowed to surrender: but that Court refused to hear him till the costs should be paid. He then renewed an application for his discharge under the Insolvency Acts which he had previously made to the county court, and which had been adjourned; when the judge adjourned the application sine die, with leave to him to come up upon giving ten days' notice.

On an application to this Court for an order to the county court judge to hear the application:

Held, that the judge had heard and decided: that the adjournment was warranted by stat. 1 & 2 Vict. c. 110, s. 72; but, even if it was not so warranted, that the judge would have only decided wrongly, but would not have declined jurisdiction.

Application refused.

Seem, that the proceedings in bankruptcy would have justified the county court judge in dismissing the petition absolutely. *Ex parte Monroe*, 822

IV. Order of adjudication of bankruptcy, under Bankrupt Law Consolidation Act, must state the facts giving jurisdiction.

Where, under sect. 223 of The Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), the Bankruptcy Commissioner adjudicates a trader, who has petitioned under sect. 211, to be a bankrupt, he must state in the order of adjudication the facts giving him jurisdiction so to do under sect. 223: otherwise the order of adjudication is void.

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Action on a covenant by a debtor to pay the premiums on a policy of insurance on the life of the debtor, which was assigned to the plaintiff as a security for his debt. Plea, bankruptcy and certificate of the defendant. New assignment, that the action was for non-payment of a premium due after the certificate. Plea to the new assignment, on equitable grounds, that plaintiff proved part of the debt under the bankruptcy, and elected to take the benefit of the petition in respect of the debt. Demurrer and issue. On the trial it appeared that plaintiff proved the balance of the debt, but expressly reserved the sum secured by the policy.

Held, that the election to take the benefit of the petition for the whole debt was not an inference of law from the proof of part. That the averment in the plea must be understood as of an election in fact: therefore the plea was good, but not proved. The defendant had judgment on the demurrer; and the plaintiff had the verdict. *Elder v. Beaumont*, 353

VII. Election by assignees, of a lease.

M., being lessee of certain premises for a term of years to G., under a lease containing a covenant by G. that M. should at any time during the term be at liberty to purchase the freehold, and having made arrangements for borrowing a sum of money for the purpose of making such purchase, agreed with A., in consideration of A.'s having paid off certain mortgages upon the premises, to assign the said freehold to A. by way of mortgage, subject to a first mortgage to the lender of the

purchase-money. A deed was executed by M., which recited among other things, that G. had conveyed the freehold to M., leaving a blank for the date of the indenture of conveyance, and recited also that M. had made a mortgage to the lenders of the purchase-money, a blank being left for the date of the deed of mortgage. It then witnessed that M. conveyed the premises (subject to such last-mentioned mortgage), "and all the estate, right, title, interest, property, claim, and demand whatsoever" of M. in the said premises, to A., his heirs and assigns, for ever. The freehold was not then, nor was it eventually, conveyed by G. to M.

Held, that the deed did not pass M.'s leasehold interest; that, looking at the intention of the parties, the deed must be construed as intended to pass the freehold, when purchased; and that, such purchase never having been made, the deed was, with respect to those premises, wholly inoperative.

The assignees of a bankrupt, lessee of an hotel, upon the bankruptcy closed the hotel, with the exception of the tap, which was occupied by a third party, tenant to the bankrupt before the bankruptcy. He was supplied, by order of the assignees, with beer and spirits at a slight advance over cost price, he keeping the proceeds of the business for himself, and the profit on the sale to him being credited to the bankrupt's estate. The license of the tavern was renewed in the bankrupt's name by the assignees. A distress was put in upon the premises on two occasions by the lessor; and the assignees, after asking for time, paid rent and costs of distress, for the purpose, as they stated, of saving the furniture, which was afterwards removed from the premises by their order. On their being threatened with ejectment for certain breaches of covenant, their attorney said they would resist the ejectment. The tap was afterwards closed by their order.

Held, on a case giving the court power to draw inferences of fact, that these acts did not show an election to take the lease.

Under circumstances leaving it in doubt whether the assignees are adopting a lease or not, the lessor should take steps to compel the assignees to elect, under the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), s. 145. *Goodwin v. Noble*, 587

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Held that the order was good, under stat. 7 & 8 Vict. c. 101, s. 2, and stat. 8 & 9 Vict. c. 10, sched. No. 4; the whole proceeding being in effect founded on the original application, and it not being necessary that the summons should issue at the time when the application is made. *Potts v. Cumbridge*, 847

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BILLS OF EXCHANGE.

I. Agreement by holder, with a stranger, no party to the bill, to give time to acceptor; no defence to an action by holder against drawer.

Action by holder of a bill of exchange against the drawer. Plea: that plaintiff, after endorsement to him by defendant, and while holder, and without defendant's consent, agreed with K. to give time to the acceptor, in consideration that K. would see the bill paid: and that plaintiff gave time accordingly: whereby plaintiff discharged defendant from payment. K. was not alleged to be a party to the bill.

Held, that the plea was bad, inasmuch as the agreement to give time, not being with the principal debtor, but with a stranger, no party to the bill, did not discharge the defendant as surety. *Frazer v. Jordan*, 303

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The execution of a bill of sale was attested by a witness who signed as "W. R. C., clerk to Messrs. B. & R., Solicitors, Temple." It was in due time filed with an affidavit, which commenced "I, W. R. C., of King's Bench Walk, Inner Temple, in the city of London, clerk to Messrs. B. & R. of the same place, solicitors, make oath and say." In the body of the affidavit it was stated that the bill of sale was executed in the presence of the deponent; but there was no further description of the residence of the attesting witness. On the trial of a feigned issue to try whether the bill of sale was valid against an execution-creditor, it was proved that W. R. C. was clerk to the solicitors, whose office was in King's Bench Walk, that all his business hours were passed there, and that it was the place where he would be most readily heard of, but that he took his meals and slept elsewhere.

Held, that the description of the residence was sufficient to satisfy the requirements of stat. 17 & 18 Vict. c. 36, s. 1. *Blackwell v. England*, 541

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S., a candidate at an election of members of Parliament, being in his committee-room, and asked by his election agent whether it was legal to pay the travelling expenses of outvoters—i. e., the money out of pocket—replied, after consulting a law-book, "I am of opinion that it is legal;" whereupon the agent's clerk, who was present, immediately added to a printed circular addressed to outvoters, and requesting them to come and vote

for S., the words, "Your railway expenses will be paid." C., an outvoter, received one of the letters, and went by railway and voted for S., and was paid his travelling expenses out of pocket by S.'s agent. In an action to recover penalties for bribery under the statute 17 & 18 Vict. c. 102, s. 2, the 7th count being for paying money to induce C. to vote, and the 8th count for corruptly paying money to C. in consequence of C. having voted for S.:

Held (reversing the judgment of the Ex. Ch., Bramwell, B., dissenting), that, assuming the letter to be sent by S.'s authority, there was evidence for the jury that S. was guilty of bribery within 17 & 18 Vict. c. 102, s. 2, for that the letter meant that the payment was to be conditional on C. voting for S.:

Held, further (Coleridge and Wightman, Js., and Bramwell, B., dissenting), that there was evidence for the jury of the defendant having authorized the letter to be sent.

Held, further (Lord Wensleydale doubting, and Coleridge and Wightman, Js., and Bramwell, B., dissenting), that there was evidence for the jury of S. having corruptly paid money to C. in consequence of C.'s voting, within the 17 & 18 Vict. c. 102, s. 2.

Held further, that the evidence was not sufficient to support both counts, so as to enable two penalties to be recovered, there being only one act of bribery. *Cooper v. Slade*, 1151]

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III. To a district chapel: tenure of office: what amounts to a reappointment: authority of minister.

Under stat. 28 G. 3, c. 10, and stat. 30 G. 3, c. 69, a chapel became vested in trustees to be used as a chapel of ease to the parish church; and, in 1843, defendant and plaintiff were respectively appointed, by the vicar of the parish, minister and clerk of such chapel. By an order in council, made in 1854, under stat. 59 G. 3, c. 134, s. 16, and stat. 2 & 3 Vict. c. 49, s. 3 (Church Building Acts), a district was assigned to the chapel so as to form a district chapelry. By stat. 59 G. 3, c. 134, s. 29, the clerk in every church and chapel erected, built, or acquired or appropriated under the provisions of that Act, or of stat. 58 G. 3, c. 45, shall be annually appointed by the minister of the church or chapel. By stat. 8 & 9 Vict. c. 70, s. 17, the church of any district chapelry shall be a perpetual curacy and benefice; and the minister shall be a perpetual curate, and shall not be in anywise subject to the control or interference of the rector of the parish. The plaintiff never received any appointment as clerk from the defendant, but continued to act as clerk without interruption until 18th August, 1855, when he received from the defendant a notice to quit on the 26th instant. On 26th September, 1855, the plaintiff went to the vestry of the chapel to perform his duties as clerk, when the defendant ordered him to leave, and, on his refusal, had him turned out of the vestry room.

Held, in answer to questions raised by an arbitrator upon the reference of an action by the plaintiff for an assault, that the office of clerk was an annual appointment in the power of the defendant as minister of the chapel, and that the continuance of the plaintiff in the office in successive years without an express reappointment should be

construed to amount to a reappointment in each year.

Held, further, that the appointment of clerk was an office; and that the defendant had no power to dismiss from the office during the year of office without cause; and that therefore the notice to the plaintiff to leave in August, there being no evidence when the year of office began, did not remove the plaintiff.

Held, further, that the possession of the vestry room was in the defendant as minister, so as to make the entry and remaining of the plaintiff, the clerk, therein after a prohibition by the defendant a wrong which justified the defendants in removing the plaintiff, and entitled the defendants to judgment upon a plea alleging such facts by way of justification. *Jackson v. Courtenay*, 8

COMMON LAW PROCEDURE ACT, 1854.

(17 & 18 VICT. c. 125.)

I. Sect. 3. Reference to arbitration. Under what circumstances an attorney is liable for negligence in not applying for an order on behalf of his client, 396. ATTORNEY.

II. Sect. 34. An appeal against the rule directing how the verdict shall be entered, and a suggestion of error in the judgment on the verdict, may be made at the same time and argued together, 232. INSURANCE, II.

III. Sect. 68. To what cases the remedy by mandamus applies. Lies to compel a chartered Company to insert, according to the provisions of the charter, the administrator of a deceased shareholder in the register as a shareholder. Suspension of mandamus where issue of fact pending upon the same count.

Declaration, by administrator of S., against a company, alleged that defendants were incorporated by charter, subject to a direction therein contained, that the persons in the charter mentioned, and all other members of the Corporation, should, within one year from the date of the charter, execute a deed, whereby (among other things) provision should be made for the registration of all the members of the Company, from time to time, in proper books, and for the general management of the affairs of the Corporation by a board of directors. It was further alleged that a deed was prepared, containing such provisions, providing that the affairs should be managed by a board of directors, and that the board should cause the name, profession, or calling, and place of residence, of every person who should be, or from time to time should become, a proprietor of one or more shares, and the number of shares, for the time being belonging to each such proprietor, to be entered in a book to be called The Register of Shareholders, and should cause the

shares for the time being in the Company to be numbered in regular progressive order, &c.; and, on any person ceasing to be a proprietor, and on any person becoming a proprietor, the board should cause an entry to that effect to be made in such book, it being declared to be the expressed agreement and understanding of all the parties to the said deed that the register of shareholders should at all times show, and be evidence of, the persons who were the proprietors for the time being, and the number of shares held by each; and that, for that purpose, the entries which should be made in the book should be at all times binding and conclusive upon and against all the proprietors for the time being: that, as between the proprietors for the time being and their real and personal representatives, all the estates, funds, and property of the Company, and the shares of each proprietor in the capital of the Company, should be considered as personal estate, and be transmissible as such. That personal representatives should not in that capacity be proprietors of shares belonging to testators or intestates, but might become proprietors, or procure some person to become proprietor, by giving certain notice of their desire of becoming a proprietor, and executing a covenant to abide by the deed; and, on paying arrears, should be entitled to call on the board to enter their names in the Register as proprietors, and on such entry should become proprietors; and the board should cause such entry to be made. That S. became, and was entered as, a proprietor, and was so at the time of his death; and plaintiff had given the required notice of his desire of becoming a proprietor, and had done all things to entitle him to have the shares entered as his shares, and to have an entry made of S. having ceased to be proprietor; but the defendants refused to make the entry: and the plaintiff claimed damages, and also a mandamus commanding defendants to make the entry, he alleging that he was personally interested.

Held: that plaintiff was entitled to the mandamus.

Semble, that the remedy by mandamus given by sect. 68 of The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), is not confined to cases in which the prerogative writ of mandamus might have been granted.

It appearing that there was an issue of fact upon the count containing the claim of damages and prayer for the mandamus, the Court suspended the mandamus till the issue of fact should be tried. *Norris v. Irish Land Company*, 512

IV. Sect. 83. Equitable plea, by husband, to action on a joint covenant by himself and wife, to pay money due in respect of a debt

of the wife contracted before marriage, 313. HUSBAND AND WIFE, I.

COMPANY.

I. By charter.

Mandamus lies, under sect. 68 of Common Law Procedure Act, 1854, to compel them to insert, according to the provisions of the charter, the administrator of a deceased shareholder in the register of shareholders, as a shareholder, 512. COMMON LAW PROCEDURE ACT, III.

II. Joint stock Company, under stat. 7 & 8 Vict. c. 110.

Action for call. Equitable plea of transfer of shares by defendant, before call, to the secretary, as trustee for Company. Plea of sale by Company, after call, of their business to another Company.

Action by a joint stock company, incorporated under stat. 7 & 8 Vict. c. 110, against a shareholder, for a call. Plea, on equitable grounds: that before the said call defendant, being then a director, agreed with the other directors that he should retire from the Company, and transfer his shares to the secretary as trustee for the Company, and should be released and indemnified by the Company from all liability to the Company's debts; that defendant carried out his part of the agreement; and that the said transfer "was duly entered, registered, and accepted by the said Company." On demurrer, held good; that, upon the pleadings, the transfer and acceptance must be taken to have been made according to the provisions of the statute, and that sects. 27 and 29 did not apply to contracts, by the directors, of this description.

Plea: that, after the call, plaintiffs sold their business to another Company, on the terms that the said Company should take upon themselves all the liabilities of plaintiffs, including those in respect of which the said call was made: and that the claim in the declaration mentioned was, by the said sale on the terms aforesaid, and with the consent of the defendant and plaintiffs, fully satisfied and discharged. On demurrer, held bad. *Plate Glass Universal Insurance Company v. Sunley*, 47

III. Railway.

i. Liability to repair bridge and road carried over a railway, 836. RAILWAYS CLAUSES CONSOLIDATION ACT.

ii. Action by administratrix, against railway Company for carrying a crane on their premises in unsafe condition, whereby deceased was killed, 1035. NEGLIGENCE, II.

IV. Banking.

Bond to Company, by two obligors, one a

customer; equitable plea of release by the other, to an action by the Company on the bond, 1065. BANKER.

V. Dock (London), principle of assessment of, under Metropolis Local Management Act, 212. RATE, II. i.

CONDITION PRECEDENT.

CONTRACT, II. INSURANCE (LIFE), II.

CONTRACT.

I. Who may contract; and how.

i. Corporations. What is, what is not, such a contract as a Corporation has an implied power to make by parol.

Action by a Corporation, incorporated as a dock company, by a statute containing no express provisions as to the manner in which the Corporation might be bound by contracts. The action was on an agreement to execute a contract under seal for scavenging the docks for a year. Plea: that the agreement on behalf of the Corporation was by parol only, and not authorized under its seal. On demurrer:

Held, that, though a corporation incorporated for trading purposes has impliedly power to contract by parol for purposes necessary to carry on the trade, the subject of this contract was not of that nature; that the Corporation therefore was not bound; and therefore the defendant was not liable: and the plea was held good. *London Dock Company v. Sinnott*, 347

ii. Joint Stock Company. What transactions by them in the shares of the Company are within the restrictions of sects. 27, 29 of stat. 7 & 8 Vict. c. 110, 47. COMPANY, II.

II. Conditions precedent.

Truth of matters stated in a proposal for a life policy by referees of insured, and recited in the policy, when, and when not, a condition precedent and essential to the contract of insurance, 232. INSURANCE, II.

III. Repudiation, dispensation, rescinding, of contract.

i. Rescinding of contract between vendor and vendee; mutual consent, to what extent necessary, 410. VENDOR AND VENDEE, III.

ii. Contract by A. with B., to complete houses of B. B.'s taking possession of them, while contract uncompleted, no evidence of dispensation by him.

By a building agreement between A. and B., it was stipulated that A. should complete for a specified price certain works on certain houses of B., the whole to be completed on a specified day, and to be done to the satisfac-

tion of a surveyor named, upon whose approval payment was to be made. A. failed to complete the work. He sued B. on the agreement for the agreed price, and on a common count for a reasonable price according to measure and value. There was evidence, on the trial, that B. had resumed possession of the houses, and was so far enjoying the fruits of A.'s labour.

Held, upon a rule to set aside a nonsuit and enter a verdict for the plaintiff, that there was no evidence to go to the jury in support of the plaintiff's claim; for that he could not recover on the special count, not having fulfilled it; and that the mere fact of B.'s taking possession of his own land on which buildings had been erected, or where repairs had been done or alterations made to a building thereon, did not afford an inference that he had dispensed with the conditions of the special agreement under which the works were done, or of a contract to pay for the work actually done according to measure and value. *Munro v. Butt*, 738

iii. Bond to banking Company by two obligors, one a customer: equitable plea by the other of release, to an action against him by the Company on the bond, 1065. **BANKER.**

IV. Action by vendor for non-delivery of goods. Equitable plea, that the contract of sale was entered into by vendor upon a mistaken sample, of which notice was afterwards given to vendee. Equitable replication, 815. **VENDOR AND VENDEE, II.**

V. Contract by testator representing himself, bonâ fide but in mistake, as agent: his representative liable to the other contractor, upon repudiation by the alleged principal, 647. **PRINCIPAL AND AGENT, I.**

VI. Statute of Frauds.

Written memorandum of contract; what is, what is not, sufficient, 466. **STATUTE OF FRAUDS.**

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Liability of, for negligence. See **NEGLIGENCE, III.]**

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Before justices, under stat. 16 & 17 Vict. c. 128, s. 1, not admissible in subsequent indictment for a nuisance in carrying on an offensive trade, 486. **EVIDENCE, IV.**

CORPORATION.

Contract by. **CONTRACT, I. i.**

COSTS.

I. Right to.

i. In Superior Courts.

(1). In actions brought in the superior Courts, where they have concurrent jurisdiction with the county courts.

The provisions in stat. 19 & 20 Vict. c. 108, s. 18, do not affect the right to costs in cases where the superior courts have concurrent jurisdiction with the county courts. *Waterlow v. Dobson*, 585

(2). Judgment signed on bill of exchange, on default of defendant's appearance: right to costs, under Summary Procedure on Bills of Exchange Act.

Under sect. 1 of The Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), a plaintiff who recovers judgment on a bill of exchange upon default of defendant's appearance is entitled to costs as there limited, though the sum recovered is less than 20*l.*, and the action is within the jurisdiction of the City of London Small Debts Court, notwithstanding The London (City) Small Debts Extension Act, 1852 (15 & 16 Vict. c. lxxvii.), sects. 119, 120. *Healey v. Johns*, 946

ii. At Sessions.

(1). Dismissal by Sessions, for want of jurisdiction, of appeal against allowance of parish surveyor's accounts. Jurisdiction as to costs.

An inhabitant of the parish of H. gave notice of appeal to Quarter Sessions against the allowance of the surveyor's accounts. At the Sessions, the Court dismissed the appeal for want of jurisdiction, under stat. 5 & 6 W. 4, c. 50, and ordered the appellant to pay the costs.

Held, that the Sessions had, under stat. 12 & 13 Vict. c. 45, s. 5, jurisdiction to order the payment of costs. But, *semble*, they would have had no such jurisdiction under stat. 5 & 6 W. 4, c. 50. *Regina v. Padwick*, 704

(2). Costs of appeal against a rate under a local Act, taxed by the Recorder. Order for costs drawn up at subsequent Sessions, before Deputy Recorder, a rated inhabitant, held voidable.

On appeal, against a valuation of rateable property under a local Act (19 & 20 Vict. c. xvii.), to the Sessions for the borough of C., the recorder, who tried the appeal, reduced the rate, and ordered that the costs should be paid by the respondents. The amount of costs not being then ascertained, he adjourned the case to the next Sessions. At these a deputy recorder (appointed under stat. 6 & 7 Vict. c. 89, s. 8) presided. The costs were in fact taxed by the recorder, who reduced them: but the order for costs was drawn up at the Sessions at which the deputy recorder presided, and formally entered as of such Sessions, the deputy recorder

der, however, not otherwise taking any part in the matter.

The respondents were the parish officers of a parish comprised in an union which comprehended several other parishes; and the deputy recorder was a rated inhabitant in one of such other parishes. All the parishes contributed to a common fund for the relief of the poor.

Held that the order for costs must be considered as the order of the deputy recorder, and was voidable on account of his interest. And that stat. 16 G. 2, c. 18, s. 1, was inapplicable, as applying only to cases where justices act as such, in the making of orders out of Court, and not to the exercise of appellate jurisdiction. *Regina v. Recorder of Cambridge*, 637

II. Taxation of: in superior Court.

Allowance of some, disallowance and reduction of other, particulars of demand. Distributive entry of verdict: allowance of costs on taxation, 161. VERDICT.

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I. Specific jurisdiction, as County Courts.

i. Seizure, by bailiff, under warrant, of goods belonging to a stranger, in the house of the debtor. Such goods not distrainable, under stat. 19 & 20 Vict. c. 108, s. 75, for the rent due to landlord.

If the bailiff seizes, under a warrant of a county court, goods belonging to a stranger, he cannot, under stat. 19 & 20 Vict. c. 108, s. 75, distrain such goods for the rent of the landlord; and, if he does so, the true owner is entitled to have his goods back. *Beard v. Knight*, 865

ii. Right to costs in actions brought in the superior courts, where they have concurrent jurisdiction with county courts; not affected by stat. 18 & 19 Vict. c. 108, s. 18, 185. COSTS, I. i.

II. Jurisdiction as courts of bankruptcy and insolvency.

i. Petition of execution creditor to insolvent court, under stat. 1 & 2 Vict. c. 110, s. 36, may be referred, under stat. 10 & 11 Vict. c. 102, s. 10, to a county court, 605. BANKRUPT AND INSOLVENT, I.

ii. Indictment for perjury in a petition in bankruptcy, presented and filed at a county court; what is a sufficient allegation of jurisdiction.

Indictment for perjury charged that a petition for protection from process was, under stats. 5 & 6 Vict. c. 116, 7 & 8 Vict. c. 96, and 10 & 11 Vict. c. 102 (Insolvent Debtors' Acts), filed and presented at the county court of B. at W. by defendant; that he afterwards obtained an order of protection; that after-

wards, while the proceedings were pending in the said county court, to wit, at the time of filing the petition and schedule, he came before K., a commissioner to administer oaths in Chancery (duly appointed and empowered to act in the matter of the insolvent, and take defendant's oath then and there), at the county court, and within the jurisdiction aforesaid, for the purpose of making an affidavit and verifying his petition on oath, and was duly sworn before K., and swore and took his oath that the affidavit then made was true. K. having competent power and authority to administer the oath. The indictment then alleged that certain matter was material in the matter of the insolvency, and that the affidavit was false in respect thereof. Defendant was convicted, and judgment passed.

Held, on error, that the jurisdiction of the Court sufficiently appeared, though there was no express allegation that defendant had resided, for six calendar months before the filing of the petition, within the district of the county court, as required by sect. 6 of stat. 11 & 12 Vict. c. 102. *Walker v. The Queen*, 439

III. Appointment of clerk.

Death of one of two clerks, appointed jointly, under stat. 9 & 10 Vict. c. 95, s. 25. Effect as to survivor's tenure of office.

Where one of two, appointed, under stat. 9 & 10 Vict. c. 95, s. 25, "to execute jointly the office of clerk" to a county court, dies, the survivor continues to hold the office; though he cannot act till a successor to the deceased person be appointed. *Regina v. Wake*, 384

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On a railway Company's premises. Action for negligence against them, for keeping it in unsafe condition, 1035. NEGLIGENCE, II.

DEED.

By lessee of premises, reciting the conveyance to him of the freehold by the owner (a blank being left for the date of such conveyance) and purporting to convey to A. "all the estate, right, title, interest, property, claim, and demand whatsoever" in the premises. The freehold was never in fact conveyed to the said lessee. Held that the deed must be construed only as intended to pass the freehold, and that it did not pass the leasehold interest of the lessee, 587. BANKRUPT AND INSOLVENT, VII.

DECLARATION.

On behalf of party proposing to insure life INSURANCE, II.

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Right, in what cases, of Crown to present to an English benefice, on the appointment by the Crown of the incumbent to a bishopric, 610. INCUMBENT.

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Of contract. CONTRACT, III.

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EASEMENT.

Ancient lights. Abandonment, or appearance of abandonment, of the easement, by the owner of the tenancy; when a defence to an action by him for obstruction.

Plaintiff was owner of a house in which there were ancient windows. Plaintiff's predecessor blocked them up; and they continued blocked up for nearly twenty years. Defendant purchased the adjoining land, and proposed to build upon it. Plaintiff, by way of asserting the right to the light, opened his ancient windows. Defendant obstructed them. On the trial of an action for this obstruction, the Judge directed the jury that, if the right to light had once been acquired, it continued unless lost; and he directed them, if they thought the right had once been acquired, to find for the plaintiff, unless they thought his predecessor had, in blocking up the windows, manifested an intention of permanently abandoning his right to the light, or unless they thought that the lights had been kept so closed as to lead the defendant to alter his position in the reasonable belief that the lights had been permanently abandoned. The plaintiff having had a verdict:

Held, that the defendant had no ground to complain of this as a misdirection. *Quare*, Whether the manifestation of an intention to abandon the lights communicated to the owner of the land would destroy the right, until the owner of the land altered his position in reliance thereon. *Stokoe v. Singers*, 41

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I. Of creditor of bankrupt, proving part of debt, to take the benefit of the petition with respect to the whole. Equitable plea to that effect, to an action by the creditor on a security, 553. BANKRUPT AND INSOLVENT, VI.

II. By assignees of a bankrupt, to take a lease, 587. BANKRUPT AND INSOLVENT, VII.

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I. Practice of the new Court of Exchequer Chamber in criminal cases, ordered to be the same as the practice in error of the Queen's Bench in similar cases, 54. JURY.

II. Suggestion of error in the judgment on a verdict, and an appeal against the rule directing how the verdict shall be entered, may be made at the same time, and argued together, 232. INSURANCE, II.

[ESCAPE.

See SHERIFF.]

EVIDENCE.

I. Trespass. Evidence of ouster

Plaintiff and defendant occupied adjoining plots of ground, divided by a wall, of which they were tenants in common. There was a shed in defendant's ground contiguous to the wall, the roof of which rested on the top of the wall across its whole width. Defendant took the coping stones off the top of the wall, heightened the wall, replaced the coping stones on the top, and built a wash-house contiguous to the wall, where the shed had stood, the roof of the wash-house occupying the whole width of the top of the wall: and he let a stone into the wall, with an inscription on it stating that the wall and the land on which it stood belonged to him.

Held, that on these facts a jury might find an actual ouster by defendant of plaintiff from the possession of the wall, which would constitute a trespass upon which plaintiff might maintain an action against defendant. *Stedman v. Smith*, 1

II. Contract by A. with B., to complete houses of B. B.'s taking possession of them, while contract uncompleted, no evidence of dispensation by him, 738. CONTRACT, III. ii.

III. Secondary evidence of a second will, revoking the first, when admissible: onus of proof, where presumption is that second will was destroyed animo cancellandi, 876. WILL.

IV. Indictment for nuisance in carrying on an offensive trade: evidence not admissible of previous conviction under stat. 16 & 17 Vict. c. 128, s. 1.

On an indictment for a nuisance in carrying on an offensive trade, a conviction of the defendant before justices for an offence against stat. 16 & 17 Vict. c. 128, s. 1, committed at the same place and in the course of the same trade, but anterior to the period comprised in the indictment, was received in evidence.

Held by the whole Court (Lord Campbell, C. J., Coleridge and Wightman, Js.), that it was improperly received, the offence of which defendant was convicted not necessarily being a nuisance.

And, by Lord Campbell, C. J., and Coleridge, J., even if it had been a conviction for an offence precisely similar to that charged against the defendant, except that it was anterior in time, it would not have been admissible. Wightman, J., not concurring. *Regina v. Fairie*, 586

V. Evidence of illegitimacy of pauper, on appeal against her removal, the illegitimacy not having been stated in a previous order for her removal, 720. POOR, I. i.

VI. Evidence of refusal by husband to maintain wife, 451. HUSBAND AND WIFE, III.

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A set-off cannot be claimed of a loss on a policy underwritten by testator with a broker, against the amount due to the executor for premiums from the broker, 683. SET-OFF.

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Of a garrison town, occupying Crown property in that capacity; when and how rateable, 360. RATE, I. ii.

HIGHWAY.

I. Maintenance of.

i. Within district of a local board of health.

The maintenance of the highways within the district of a local board of health must be provided for by a district rate, and not by a highway rate, whether the district be or be not coextensive with an ancient parochial division. *Tuff Vale Railway Company v. Cardiff Local Board of Health*, 535

ii. Under General Highway Act. Indictment for non repair. HIGHWAY ACT, II.

II. Stopping of, by certificate of justices, under Highway Act. Appeal. HIGHWAY ACT, I.

III. Surveyor of; no appeal by him, against order of justices disallowing his accounts, 563. HIGHWAY ACT, III.

HIGHWAY ACT.

(5 & 6 W. 4, c. 50.)

I. Sect. 88. Appeal against certificate of justices for stopping a highway; within what time to be brought; general practice on appeals at quarter sessions.

Under sect. 88 of stat. 5 & 6 W. 4, c. 50, an appeal against a certificate of justices for stopping a highway cannot be brought unless ten days' notice has been given before the Quarter Sessions held next after the expiration of four weeks from the lodging of the certificate with the clerk of the peace.

Where the Sessions had entered and respited an appeal, of which such notice had not been given, this Court quashed the order of Sessions on certiorari.

Where the General Quarter Sessions commences on a certain day, and is in practice afterwards adjourned and held on another day in another place, for the purpose of deciding matters in its vicinity, the notice of appeal must be given ten days before the day first mentioned, though the highway is in the vicinity of the latter place. *Regina v. Justices of Lancashire*, 563

II. Sect. 95. No discretion in justices as to ordering an indictment for non-repair, where, upon summons, party charged denies liability.

Under stat. 5 & 6 W. 4, c. 50, a. 95, if a party charged before magistrates with liability to repair a highway which is out of repair deny the liability, the magistrates must direct an indictment to be preferred. They have no discretion as to this: and, if they refuse, a mandamus will be issued commanding them to make the order.

Although evidence was tendered, before the magistrate, to show that the alleged highway was set out under an enclosure act, and had not been declared, in compliance with stat. 41 G. 3 (U. K.) c. 109, a. 9, to be complete; and although the same facts are deposed to in answer to the application for the mandamus. *Regina v. Arnold*, 550

III. Sects. 44, 105. No appeal by surveyor against disallowance of accounts.

Under sects. 44, 105, of stat. 5 & 6 W. 4, c. 50, no appeal lies, on the part of the surveyor of the highways, against an order of justices at highway sessions allowing part of his accounts and disallowing the rest, and ordering him to pay over to his successor the amount disallowed. *Regina v. Justices of Leicestershire*, 537

HUSBAND AND WIFE.

I. Exoneration, in equity, of the husband's estate, where he has covenanted jointly with wife to pay money due in respect of a debt

of hers, contracted before marriage. Equitable plea to that effect.

Declaration upon a covenant, by defendant and wife, to pay money. Equitable plea: that defendant and wife, by the deed in question, mortgaged certain lands, of which they were seised in fee in right of the wife, to plaintiff in fee, as a security for money (of which the sum pleaded to was parcel), lent by plaintiff to defendant and wife, at the request of the latter, for the purpose, amongst other things, of repaying, with the said sum, parcel, &c., a sum, borrowed of another person by defendant and wife, also at her request, for the purpose of discharging a debt of the wife, contracted before marriage: that the wife died, leaving plaintiff her heir at law, who thereupon became entitled to the equity of redemption in fee, in addition to the legal estate in fee simple, in the said lands: that the lands were of more value than the moneys as to which the plea was pleaded, and all costs, &c., and became, upon the death of the wife, the primary fund for paying the moneys to which the plea was pleaded; which sums, as plaintiff was entitled to the said lands, and the said moneys, and the said equity of redemption, were in equity satisfied before suit by the value of the said lands.

Held, on demurrer, that the plea disclosed facts which would entitle defendant to an absolute and perpetual injunction, and was, therefore, good as an equitable defence under The Common Law Procedure Act, 1854, sect. 83. *Gee v. Smart*, 313

II. Covenant by husband to pay allowance to wife, while living separate, to cease in the event of subsequent cohabitation under written agreement. Effect of subsequent cohabitation not under written agreement.

By deed between defendant of the first part, his wife of the second, and plaintiff of the third, it was recited that differences had arisen, and were likely to continue, between defendant and his wife, and they had agreed to live apart during the remainder of their lives, subject to the proviso after mentioned; and defendant covenanted with plaintiff to allow the wife to live separate, and go where she thought fit, &c., free from his restraint, and that he would not disturb her, or sue her in the Ecclesiastical Court, or otherwise, or claim the goods which she then had or might purchase; and that, as and by way of a provision for her, he would pay to plaintiff or to her, during her life, 10s. weekly: and plaintiff, in consideration of the provision so made, and the other promises, covenanted that the wife, during the separation, would not molest defendant, or sue for conjugal rights to compel him to cohabit, or for further allowance by way of alimony; and that plaintiff would keep defendant indemnified for debts con-

tracted by the wife during the separation: provided that, in case defendant and his wife should by writing under their hands agree to cohabit, and should cohabit for one month next thereafter, the indenture should be void.

Plaintiff declared against defendant on this deed, averring that defendant and his wife did not by such writing, or otherwise, agree to cohabit, nor cohabit for one month after, or at all; that the wife was alive; that defendant made default in the weekly payments.

Plea, upon equitable grounds, that, before the accruing of the causes of action, defendant and his wife were reconciled and cohabited together, and continued to do so, to wit, for six months thereafter.

Issue having been taken on this plea, and a verdict found for defendant, judgment was arrested:

(1) Because the reconciliation without agreement in writing did not impliedly avoid a deed framed with such an express proviso;

(2) Because without the proviso, the reconciliation would not have avoided the deed, which would have been in the nature of an absolute postnuptial settlement for the wife's life, holding out no inducement to live separate. *Randle v. Gould*, 457

III. Conviction, by justices, of husband for refusing to maintain his wife. What is, what is not, sufficient evidence of such refusal.

Upon conviction of a man, under stat. 5 G. 4, c. 83, s. 3, for wilfully refusing or neglecting to maintain his wife, a case was stated by the magistrates under stat. 20 & 21 Vict. c. 43, s. 2. The statement was that it appeared on the hearing that appellant on a former occasion, his wife having before that been relieved by the parish while living apart from him, had been summoned, and had then promised to make her a weekly allowance, which he had since failed to do, and the wife had been supported by the parish since then. That, at the hearing on which the conviction appealed against took place, he offered to repay what the parish had paid, and to receive his wife; that evidence was given to the satisfaction of the magistrates that he had ill used his wife, who thereupon refused to live with him; that appellant undertook to treat her kindly; that the magistrates were satisfied that he had for a length of time neglected to support her, and that the offer to receive her was only to screen himself from the consequences of the neglect.

Held, that the conviction was wrong, for that, assuming the fact of ill usage sufficient to constitute a ground for the wife's refusal to live with the appellant, there was no evidence of a refusal to support her. *Flanagan v. Overseers of Bishop Wearmouth*, 451

IMPOUNDING.

Under distress. LANDLORD AND TENANT, II. i.

INCUMBENT.

Right of Crown, in what cases, to present to an English benefice, on appointment by the Crown of the incumbent to a bishopric.

The right of the Crown to present to an English benefice upon the appointment of the incumbent by the Crown to a bishopric is not barred by the Crown having, before such appointment, granted the advowson to a subject.

But no such right exists in the case of an appointment to the bishopric of Christ-church in New Zealand. *Regina v. Eton College*, 610

INDICTMENT.

I. For murder. Right of Crown to challenge, 54. JURY.

II. For nuisance in carrying on an offensive trade. Evidence not admissible of previous conviction before justices under stat. 16 & 17 Vict. c. 128, s. 1, 486. EVIDENCE, IV.

III. For non-repair of highway. HIGHWAY ACT, II.

IV. Lies against a pariah for not receiving a pauper in obedience to an order for removal: mandamus not the proper course, 856. POOR, I. ii.

INSOLVENT.

BANKRUPT AND INSOLVENT.

INSURANCE (ON LIVES).

I. By one person on the life of another. Insertion of name of party interested, how to be made.

Under stat. 14 G. 3, c. 48, s. 2, in every policy on the life of another, whether a bond fide, or a gaming, or wager, policy, the name of the person interested in such policy must be inserted therein at the time of making, as that of the person interested; otherwise the policy is void. *Hodson v. Observer Life Assurance Society*, 40

II. Construction of policy. Effect of fraudulent declaration by the referees (recited in the policy) as to the state of health of the insured, he not being a party to the fraud. When the truth of such declaration is a condition precedent.

Count. For that, by a deed poll sealed by defendants, directors of The W. Life Insurance Association, after reciting that plaintiffs, being interested in the life of J., had caused to be delivered into the office of the association "a proposal for assurance in writing," "whereby it was declared that,"

inter alia, J. had not had any fit since childhood, "and that the said association had thereupon undertaken the proposed assurance, subject to the terms and conditions therein and thereunder expressed." Usual covenant to pay if J. died. Breach, non-payment. The conditions were set out, and contained no further warranty than above that J. had not had fits.

Plea 1. Fraud. Pleas 2 and 3. That the policy was obtained by false statements and false concealments of material facts. Plea 4. That the "declaration in the policy and in the declaration in this cause mentioned," that J. had not had any fit since childhood, was untrue. Issue was taken on these pleas. On the trial it was proved that the proposal in fact signed, referred to the answers of J., his ordinary medical attendant, and a friend to whom he had referred, rendered to another insurance company; and that it concluded with a declaration "that we believe the above particulars and statements are true." The jury found that statements made by J., his usual medical attendant, and his private referee, including a statement that he had not had fits since childhood, were false, and that there was fraud on their part against defendants, but no fraud on the part of the plaintiffs.

Held by the Q. B., on a point reserved, that the life insured, the medical referee, and the private referee were not the agents of the assured, so as to make their fraud misrepresentation, or concealment that of the assured; and that the plaintiffs were entitled to the verdict on the issues joined on pleas 1, 2, and 3. Affirmed on appeal in the Exchequer Chamber.

Held also, by the Queen's Bench, that the 4th plea referred to the statement recited in the policy, and was proved, and the defendants were entitled to the verdict and judgment thereon. Affirmed, as to the verdict, on appeal in the Exchequer Chamber. But

Held by the Exchequer Chamber, reversing the judgment of the Queen's Bench, that there was no warranty of the truth of the matters recited in the policy to have been declared in the proposal, or anything in the nature of the contract, as set out on the record, showing an intention that the truth of these matters should be the basis of the contract; and consequently that the plea, not averring a scienter, was bad, and the plaintiffs entitled to judgment on it non obstante verdicto.

A suggestion of error in the judgment on a verdict, and an appeal against the rule directing how the verdict shall be entered, may be made at the same time and argued together.

There was also a replication on equitable grounds to the 4th plea: that, before the policy was entered into, defendants circulated

a prospectus, whereby they undertook that their policies should be unquestionable, except on the ground of fraud; and that plaintiffs were induced to enter into the policy on the faith thereof. Issue thereon.

On the trial it appeared that such a prospectus was issued; but no express proof was given that the plaintiffs saw it or were induced by it to make the policy. The jury found for the plaintiffs.

Held by Wightman, Erle, and Crompton, Js., dissentiente Lord Campbell, C. J., that there was no sufficient evidence to warrant this finding. On this part of the judgment below the Exchequer Chamber pronounced no opinion. *Wheelton v. Hardisty*, 232

INSURANCE (MARINE).

I. Separate insurances on freight and ship, by owner of ship, carrying his own goods on his own account. Who is entitled to the freight, upon abandonment of the ship by her owner to the insurers.

A shipowner loaded his ship, which was bound for Liverpool, with goods on his own account; and he insured the ship and the freight of the said goods by distinct insurances. The ship was stranded at S., on the English coast, twenty miles from Liverpool. The shipowner abandoned the ship to the insurers on the ship. After the abandonment, the shipowner, at his own expense, had a part of his goods taken out and conveyed by lighters to Liverpool; and he, at his own expense, procured assistance by which the ship, with the remainder of his goods on board, was brought to Liverpool. Afterwards, the assurers accepted the abandonment. On the assured claiming for the loss of the ship from the assurer, the assurer claimed credit for the freight of the goods of the shipowner.

Held: that nothing in the nature of freight for the carriage of the shipowner's goods to S. passed to the abandonees; but that they were entitled to an allowance for the carriage of the part of the goods from S. to Liverpool in the ship after the abandonment, to be estimated at the current rate of freight as if brought from S. to Liverpool by another ship. *Miller v. Woodfall*, 493

II. A set-off cannot be claimed of a loss on a policy underwritten by a testator with a broker, against the amount due to the executors for premiums from the broker, 683. SET-OFF.

JOINT STOCK COMPANY.

COMPANY, II.

[JUDGE.]

Order of justices void for interest.

Where an order of Quarter Sessions con-

firmed a conviction is void on the ground of interest in the justices, this Court will grant a certiorari to bring up the order for the purpose of quashing it, with a view to a mandamus to enter continuances and hear the appeal. *Ex parte Abraham Hopkins*, 1179]

JUDGMENT.

I. Signed on a bill of exchange, in default of defendant's appearance: plaintiff's right to costs, under Summary Procedure on Bills of Exchange Act, 246. Costs, I. i.(2).

II. Against a local board of health, for a debt; a "charge" within sect. 89, of Public Health Act, for which a retrospective rate may be levied, 906. PUBLIC HEALTH ACT, II.

JURISDICTION.

I. Of the superior Courts.

When concurrent with that of county courts, the right to costs in actions brought in the former is not affected by stat. 19 & 20 Vict. c. 108, s. 18, 585. Costs, I. i. (1).

II. Of county courts.

1. As to petitions of execution creditors, referred by insolvent court, 605. BANKRUPT AND INSOLVENT, I.

2. Indictment for perjury in a petition of bankruptcy presented and filed at a county court. What is a sufficient allegation of residence within the jurisdiction, 439. COUNTY COURT, II. ii.

III. Of bankruptcy courts.

Adjournment, sine die, of an adjudicated bankrupt's application to surrender and be discharged; not a declining of jurisdiction by the judge, 322. BANKRUPT AND INSOLVENT, III.

IV. Of quarter sessions.

As to costs, on dismissal, for want of jurisdiction, of an appeal against the allowance of a paid surveyor's accounts, 704. Costs, I. ii. (1).

V. Of justices.

No discretion in justices as to ordering indictment for non-repair of a highway, where, upon summons, the party charged denies his liability, 550. HIGHWAY ACT, II.

VI. Of Metropolitan Board of Works.

In an appeal from the decision of a district board, 529. METROPOLIS MANAGEMENT ACT, IV.

JURY.

Indictment for a capital felony. Right of Crown to set aside any juror when called: when bound to challenge for cause.

On the record of the trial of an indictment

for a capital felony at the Assizes, entries were made by which it appeared that the panel of jurors returned by the sheriff was read over in order, omitting only the names of twelve jurors who, it was known, were then in the custody of the sheriff, deliberating on their verdict in another case. On the names being read, several were challenged peremptorily for the prisoner; and several were, on the prayer of the counsel for the Crown, ordered to "stand by," the counsel for the prisoner insisting that they should be sworn unless the Crown forthwith assigned cause for its challenge. When the panel had thus been read through, nine jurors had been elected. The name of I, the first who had been ordered to "stand by," was called a second time; and he answered. The counsel for the Crown prayed that he might again stand by; the counsel for the prisoner objected. Before anything was done on this request, the absent twelve came in and gave their verdict in the other case. The counsel for the Crown then prayed that I. be again directed to stand by until these twelve jurors were called. The judge so directed; and from these a complete jury was made up, to whom the prisoner was given in charge. Verdict, Guilty. Sentence of death.

The record, being thus made up, was removed by writ of error into the Queen's Bench, where the judgment was affirmed. And, on a further writ of error, a transcript of the record of the Queen's Bench was removed into the Exchequer Chamber, where the judgment of the Queen's Bench was affirmed.

Quere, Whether the above matter was properly placed upon the record, or was examinable in error at all? *Semble*, that it was not. But, on the assumption that it was so examinable,

Held, by the Queen's Bench, and affirmed by the Exchequer Chamber, that the Crown is entitled, as of right, to set aside any juror when called, and is not bound to challenge the juror for cause until the whole panel is perused, and it is found that without him a complete jury cannot be obtained.

Held that, until the twelve had been called, the panel could in no sense be perused; and that, till then, the time when the Crown was bound to assign cause had not come. *Semble*, that the panel cannot be said to be perused until all reasonable steps have been taken to cause the whole of the jurors on it to answer.

It was suggested that the judge had, of his own mere motion, ordered a juror, who, on being called, declared that he had conscientious objections to capital punishment, to stand aside; but on the record it appeared to have been done at the prayer of the counsel for the Crown.

Semble, that, if it had been done at the

mere motion of the judge, it would have been unobjectionable.

In the instances of the jurors who were passed by upon the objection for the Crown, it appeared that the order of the Court was, in form, that the jurors should "stand by." Held, that the form was unobjectionable.

It was not stated on the record that the jurors on the panel were good and lawful men of the county. It appeared that, by the venire, the sheriff was ordered to return good and lawful men of the county, and that, for the purpose aforesaid, he had impanelled and returned the persons on the panel. Held, that there was no error.

The practice of the new Court of Exchequer Chamber in error, in criminal cases, was ordered to be the same as the practice of the Queen's Bench in error in similar cases. *Mansell v. The Queen*, 54

LANDLORD AND TENANT.

I. Lease.

Election of, by assignees of bankrupt, 587. **BANKRUPT AND INSOLVENT, VII.**

II. Distress.

i. What amounts to an impounding. 40 as to avoid a subsequent tender.

A landlord entered upon a dwelling-house held of him, to distrain for rent arrear. To prevent inconvenience to the tenant, the landlord, with the tenant's assent, instead of removing the articles of furniture, upon which he proposed to distrain, made up, from a list given to him by the tenant, an inventory of the furniture in the house, put a man into possession, and handed to the tenant a notice of the distress referring to the inventory, which was also then handed to the tenant. The landlord did not go into the several rooms in which the articles were.

Held, that this constituted a distraining of the articles mentioned in the inventory and an impounding of them upon the premises; and that a tender subsequently made was too late.

Although the notice of distress did not state that the articles were impounded. *Tenant v. Field*, 336

ii. Seizure, under warrant, by bailiff of county court, of a stranger's goods, in the house occupied by the debtor. Such goods not distrainable, under stat. 19 & 20 Vict. c. 108, s. 75, for rent due from the debtor to his landlord, 865. **COUNTY COURT, I. I.**

LEASE.

LANDLORD AND TENANT, I.

LICENSE.

To keep a billiard table: no appeal against refusal by justices, 644. **BILLIARDS.**

LIEN.

Of shipowner, for freight, as against consignee of goods: not waived by express agreement, in bill of lading, that freight is to be paid by shipper, 505. *SHIP*, III. ii.

LIGHTS.

Ancient. *EASEMENT*.

LIMITATION.

Of actions. *STATUTE OF LIMITATIONS*.

LOCAL AUTHORITY.

NUISANCES REMOVAL ACT.

LOCAL BOARD OF HEALTH.

PUBLIC HEALTH ACT.

LUNATIC.

Pauper. *POOR*.

MANDAMUS.

I. Will not be granted to compel a parish to receive a pauper, in obedience to an order of removal, 856. *POOR*, I. ii.

II. Under Common Law Procedure Act. *COMMON LAW PROCEDURE ACTS*, III.

MAINTENANCE.

I. Of wife by husband. What is, what is not, sufficient evidence of refusal to maintain, 451. *HUSBAND AND WIFE*, III.

[MAXIM, LEGAL.

Application of maxim that "No one shall be permitted to take advantage of his own wrong." *Hooper v. Lane*, 1095]

MEMORANDA.

Trinity Vacation, 1857, 335.

Michaelmas Vacation, 1857, 681.

Hilary Term, 1858, 682.

Hilary Vacation, 1858, 1091.

MERCANTILE LAW AMENDMENT ACT.

(19 & 20 VICT. c. 97.)

I. Sect. 10. Imprisonment at time when cause of action accrued, not to defeat operation of Statute of Limitations: to what cases the provision applies.

Sect. 10 of The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), which enacts that a party who shall be entitled to bring an action limited by the Statutes of Limitation there mentioned, shall not be entitled to any time beyond the period so

limited by reason of his having been imprisoned at the time when the cause of action accrued, applies to cases where the cause of action accrued before The Mercantile Law Amendment Act came into operation, and no action is commenced till after that. *Cornill v. Hudson*, 429

II. Sect. 14. Statute of Limitations, avoided by payment of principal or interest by co-contractor: to what cases it applies.

A., in an action brought against B. after the passage of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), in order to bar the operation of the Statute of Limitations (21 Ja. 1, c. 16, s. 3), proved payments of principal and interest, within six years before suit, and before the passing of The Mercantile Law Amendment Act, 1856, by a co-contractor with B.; and it was stated, in a special case, that such payments were made with the knowledge and consent of B.

Held by the Court of Q. B.: that by virtue of sect. 14 of The Mercantile Law Amendment Act, 1856, assuming it to be applicable to a transaction before the Act, such proof did not bar the operation of stat. 21 Ja. 1, c. 16, s. 3; for such a finding as to the knowledge and consent of B. did not show that the defendant was charged otherwise than by reason only of payment of any principal or interest by any co-contractor or co-debtor. And that sect. 14 is so applicable. Judgment for defendant.

And, per Crompton, J., proof of express verbal consent by a defendant to a payment by a co-contractor would not take the case out of the 14th section.

Judgment reversed in Exch. Ch., on the ground that sect. 14 of The Mercantile Law Amendment Act, 1856, does not apply to the case of a payment made before the Act. *Jackson v. Woolley*, 778

MERCHANT SHIPPING ACT.

(17 & 18 VICT. c. 104.)

I. Sect. 50. Penalty for not delivering up certificate of registry; does not apply under the following circumstances.

II., the owner of the majority of the shares of a ship, being also ship's husband, and having (with the knowledge and consent of A., the master, who was also a part owner, and who acted under his orders) the management of the ship, required the master to deliver up the certificate of registry of the ship, which was then lying in her port of discharge, but had not discharged. H. intended to dismiss A. and appoint another master; but he had not communicated this intention to A., nor assigned any other reason for requiring the certificate. A. refused to deliver it up.

Held, that A. was not liable to a penalty under sect. 50 of The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), as having refused to deliver up the certificate to the person entitled to the custody thereof for the purposes of navigation, without a reasonable ground of refusal. *Arkley v. Hensell*, 828

II. Sects. 70, 71. Mortgage of ship by registered owner, with proviso postponing power of sale; held valid. *Semble*, want of endorsement on certificate of registry no bar to title of mortgagee.

The claimant, upon an interpleader summons in the county court as to his alleged title to a ship seized in execution upon a judgment against the registered owner, proved a previous mortgage of the ship to him by such owner for a loan, with a proviso in the mortgage postponing until a date subsequent to the seizure of the ship the power of sale vested in the mortgagee by sect. 71 of The Merchant Shipping Act, 1854 (stat. 17 & 18 Vict. c. 104), and that such mortgage was recorded in the register book of the port of the ship's registration in the form prescribed by sect. 66 of the same statute; but it also appeared that there was no endorsement made on the certificate of registry according to the requirements of stat. 4 G. 4, c. 41, ss. 35, 43, and of stat. 3 & 4 W. 4, c. 55, ss. 34, 42.

Held, upon appeal to the Court of Q. B., that the mortgage was not invalid either as a fraud against creditors, or as not being according to The Merchant Shipping Act, 1854, on the ground of the postponement of the power of sale.

Held, further, that, even if the registration of the mortgage was imperfect by reason of the want of the endorsement on the certificate, yet a judgment given by the county court upon the interpleader against the claimant in favour of the execution-creditor was erroneous; for the claimant became and was the owner of the ship by reason of the mortgage, and such common law incident to a mortgage is not abrogated by sect. 70 of The Merchant Shipping Act, 1854, which was intended to protect a mortgagee, taking possession of a mortgaged ship in order to make it available as a security, from liabilities that might otherwise attach upon him as owner of a ship in possession.

Semble, per Lord Campbell, C. J., that the registration in the case was perfect without any endorsement on the certificate. *Dickinson v. Kitchen*, 789

III. Sect. 352. Pilot, when liable to penalty for refusing to deliver up license.

Under sect. 352 of The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), a qualified pilot refusing to deliver up his license

when required to do so by the pilotage authority, is liable to a penalty, and cannot defend himself on the ground that the pilotage authority has acted capriciously in requiring the delivery. *Henry v. Newcastle Trinity House Board*, 723

IV. Sect. 353. Exemption of masters piloting their own ships from employing a licensed pilot, in what cases.

The exemption given by stat. 6 G. 4, c. 125, s. 59, from the necessity of employing licensed pilots, to masters piloting their own ships on the voyages there specified, without the aid of an unlicensed pilot, is continued by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), sect. 353; and this exemption applies as well to ships carrying, as to ships not carrying passengers, and is not affected by the exemption given in sect. 379 of the same Act to ships on particular voyages not carrying passengers. *Regina v. Stanton*, 445

METROPOLIS LOCAL MANAGEMENT ACT.

(18 & 19 Vict. c. 120.)

I. Sect. 120. Removal of obstructions. What are "projections" and "obstructions:" what is "part of a street."

Plaintiff occupied a house standing in a continuous line of houses, in a district within the provisions of the Metropolis Local Management Act (19 & 20 Vict. c. 120). Immediately in front of these houses was a paved public footway, fifteen feet wide, then a space thirty-three feet wide, then a public carriage-way fifty feet wide, then an intermediate space fifty-eight feet wide, then a paved public footway ten or twelve feet wide, immediately in front of another continuous line of houses facing the first-mentioned line. The intermediate spaces between the footways and the carriage-road had always been made use of by the owners of the houses opposite in such manner as suited their respective occupations: in some instances they had erected permanent structures; and plaintiff, whose house was a public-house, had, before the Act came into operation, placed in the part opposite to his house a permanent horse-trough; and the carts of his customers stood on that space while the drivers and horses were resting; he had also put there movable seats, and in summer a movable shed, and had fixed sockets which were let into the ground. The footway was always left clear. Plaintiff paid the owner of the soil for permission to use the intermediate space. The public passed over the intermediate space as of right, subject to the above-described user of it by the owners of the houses. Persons

wishing to get from the footway to the carriage-road did so without objection, picking their way where the space was not obstructed. The vestry elected under the Act having removed the plaintiff's shed and seats as obstructions, within sect. 120: held that the section did not justify them:

1. Because the intermediate space was not part of a street within the meaning of the Act.

2. Because the shed and seats were not projections or obstructions against or in front of any house within the meaning of the Act. *Le Neve v. Vestry of Mile End Old Town*, 1054

II. Sects. 159-161. General rate, including paving rate, levied on The London Dock Company, previously assessed, as to paving rates, under a local Act. Principle of assessment, 212. RATE, II. I.

III. Sects. 158-161, 170-174, 250. Rate by "guardians" of a parish, under a local Act, under a precept from the vestry to the "overseers" of such parish, in obedience to a precept from the Metropolitan Board: what is a valid precept by the vestry, and rate by the guardians, 992. RATE, II. ii.

IV. Sect. 214. Appeal from decision of district board. Extent of jurisdiction of Metropolitan Board.

A certiorari issued to bring up an order of the Metropolitan Board of Works made, under stat. 18 & 19 Vict. c. 120, s. 214, on an appeal from a decision of the district board, by which order compensation was granted to D. as an officer to certain commissioners. The certiorari is taken away by sect. 230. This certiorari was issued on affidavits by which it appeared that D. was not an officer, and that consequently the order was made without jurisdiction. On showing cause against a rule to quash this order:

Held, that the Board of Works had jurisdiction on the appeal to decide whether D. was an officer or not; and that, even assuming that their decision was wrong in fact, the order was not without jurisdiction. The rule to quash the order was discharged, and the writ of certiorari quashed, quia improvidè emanavit. *Regina v. St. Olave's District Board*, 529

METROPOLITAN BUILDING ACT.

(18 & 19 Vict. c. 122.)

I. Sect. 38. Notice to district surveyor before commencement of building. Exemption, under sect. 8, of militia store buildings.

Buildings erected by the Commissioners of Lieutenancy of the City of London, under stat. 1 G. 4, c. 100, s. 39, and stat. 17 & 18 Vict. c. 105, s. 2, for the custody of the arms

and stores of the militia, are within the exemption in sect. 6 of The Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), as "employed for Her Majesty's use or service:" and it is not necessary to give notice to the district surveyor before commencing the building, under sect. 38. *Regina v. Jay*, 469

II. Sect. 49. Fees to surveyor for alterations. Not claimable in respect of an archway of a railway, enclosed and used as a stable.

A railway company, incorporated by and acting under the provisions of statute, constructed their railway by a viaduct formed of arches of brick-work, and used the viaduct and arches for the purposes of the railway. Afterwards, a space was enclosed under an archway by building walls with gates at each end, and constructing two stories in the enclosed space. The space so enclosed was used by a lessee of the Company as a stable, and not for the purposes of the railway. After the passing of The Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), alterations were made in the enclosing walls. The district surveyor having claimed fees in respect of such alterations, under sect. 49:

Held, that the fees were not claimable, and the structure not liable to the operation of Part I. of the Act, but exempt, under sect. 6, as a building belonging to a railway company, used for the purposes of such railway, under the provisions of an Act of Parliament; since the archway itself was so used, and the addition did not, of itself, constitute a building: and that this was not the case of an alteration of or addition to an old building, within the meaning of sect. 9, that section applying only where the old building is itself within the operation of the Act. *Re Badger*, 725

MILITIA.

Store buildings for, exempt from operation of sect. 38 of Metropolitan Building Act, 469. METROPOLITAN BUILDING ACT, I.

MINE.

Nature of the right to support, in owner of surface, as against owner of mine.

Action by reversioner of land and houses thereon for defendant negligently working mines under the land so as to cause land and houses to subside and be injured.

Defendant had worked the mines carefully, according to the custom of the country; but the subsidence had nevertheless occurred; and no natural or artificial pillars could have prevented this.

Plaintiff was owner of the surface by conveyances from P.; defendant was owner of the mines by conveyance from H.

An Act appointed Commissioners "for dividing, allotting, and enclosing" certain "common fields, common ground, and other the commonable lands, &c.," not expressly mentioning mines. It was enacted that they should "divide, ascertain, and allot the said common fields, common grounds, commonable lands and premises, hereby intended to be enclosed, unto and amongst the several persons" "entitled to or interested therein, either in right of soil or of any other right or interest whatsoever, in a due and fair proportion, as near as may be, according to the value of the shares and interests, rights of common, and other properties, of each of the said parties respectively in and over the said premises so to be divided and enclosed, without giving any undue preference to any of them, and with a just regard to the quality, convenience, and contiguity of situation, as well as to the quantity of the lands to be assigned to each proprietor, and with a just regard to any mines or delphs of coal, lime, or stone supposed to lie under the same, but subject, nevertheless, to the rules, orders, and directions by this Act prescribed." It was recited that there were lands supposed to have mines under them, and the proprietors might be desirous of retaining their property therein; and it was enacted that such of the lands of the proprietors as the Commissioners should adjudge to have any mines of coal, &c., should be "allotted and set out together, by metes and bounds, in distinct lots," for such of the proprietors as should desire and as should give certain notice thereof; or otherwise there should be set out for them "other lands under which there shall be supposed to lie mines of equal value to those which they were respectively possessed of before the passing of this Act." The Commissioners were directed to draw up an award, which should express the quantity "contained in the said common fields, common grounds, commonable lands and premises, so intended to be enclosed as aforesaid, and the quantity of each and every part and parcel thereof which shall be assigned and allotted to the several parties entitled to and interested in the same; and a description of the situation, abutments, and boundaries of such parcels and allotments respectively;" and directions for fencing, making roads, &c.; and which should "likewise specify, express, and contain such other orders, regulations, and determinations as shall be proper and necessary to be inserted therein, conformable to the tenor and purport of this Act."

P. and H. were both interested in the common lands, and in mines lying thereunder. An award was made, purporting to be under the hands and seals of the Commissioners and of other proprietors, and executed in

fact by P., but not by H., allotting certain lands to P. and H., and reciting that the mines on the estates of P. and H., previously to the enclosure, had not "been requested to be set out by metes and bounds;" and assigning to each, in lieu of the mines previously on his estate, certain mines, namely, to H. the mines lying under the allotment of P., and to P. mines not under his own allotment. The Commissioners adjudged the mines so allotted to be equal in value to the mines previously possessed by P. and H. respectively. The award contained a clause, reciting that, to preserve the convenience and situation of the allotments, it had been found necessary in some cases to assign, wholly or partially, the mines under particular allotments to persons other than those to whom the surface was awarded: and the proprietors, parties to the award, were the only persons interested in the disposal of land and mines under such circumstances, and did, by executing it, testify their acceptance of the allotments, and did, for themselves, their heirs, executors, administrators, successors, and assigns, release all interest in any of the mines except such as were allotted to them: and they did thereby, for themselves and their heirs, executors, administrators, successors, and assigns, covenant with such other, and the heirs, administrators, successors, and assigns of each other, that the mines allotted should be held by the allottees according to the intent of the award, and by them worked "without any molestation, denial, or interruption" of any parties to the presents and those claiming under them, being owners of the surface, without being subject or liable to any action or actions for damage on account of working and getting the said mines for or by reason that the surface of the lands aforesaid may be rendered uneven and less commodious to the occupiers thereof by sinking in hollows or being otherwise defaced and injured, where such mines shall be worked, the said several proprietors, parties to these presents, and interested in the disposal of lands and mines, under the circumstances aforesaid, having agreed with each other, and being willing and desirous to accept their respective allotments in their several situations hereinbefore declared, subject to any inconvenience or encumbrance which may arise from the cause aforesaid;" provided that there should be no power to sink shafts without the consent of the owners of the surface.

H. and P. took possession of their allotments, including the mines allotted: and they, and those claiming under them, held for more than eighty years before the act complained of. After such taking of possession, but more than twenty years before the

act complained of, the houses mentioned in the declaration were built.

Held, by the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the defendant was not liable to an action. Per Williams, J., Martin, B., Crowder, J., and Bramwell, B.; dissentientibus Cresswell, J., and Watson, B.

Per Cresswell, J., Williams, J., Martin, B., and Watson, B., and *semble* per Bramwell, B., the right of support is not an easement, but one of the ordinary rights of property.

Per Williams, J., Martin, B., Crowder, J., and Bramwell, B., a right to work mines so as to let down the surface, may be granted by the owner of the surface so as to bind assignees of the surface; and in this case was so granted.

Per Cresswell, J., and Watson, B., such a right cannot be created so as to bind the assignees; and the legal effect of what took place in the present case was a covenant binding P. and his representatives, but not assignees of the land. *Kowbotham v. Wilson*, 123

MISREPRESENTATION.

I. Effect of, by referees of insured, in a proposal for a life policy, the insured being no party to such misrepresentation, 232. *INSURANCE*, II.

II. Contract by testator, representing himself, *bonâ fide*, but in mistake, as agent: his representatives liable to the other contractor upon repudiation by the alleged principal, 647. *PRINCIPAL AND AGENT*, I.

MORTGAGE.

Of ship. *MERCHANT SHIPPING ACT*, II.

MUNICIPAL CORPORATIONS REFORM ACT.

(5 & 6 W. 4, c. 76.)

I. Sects. 15, 18, 19, 22. Making up of burgess lists and roll. Duty of mayor and assessors.

The mayor and assessors, at the revision of the burgess lists for a borough, erroneously treated the burgess list *de facto* made out for one of the parishes as a nullity. They then made out a fresh burgess list for that parish, and inserted on it the name of a person in the original parish burgess list who proved his title to their satisfaction; and the name thus inserted was transferred to the burgess roll.

Held, in the Court of Exchequer Chamber, upon error on a bill of exceptions, that such person, though qualified in all respects to be on the burgess list, acquired by the act of the

mayor and assessors no title to be a burgess. *Seale v. The Queen*, 22

II. Sect. 102. Appointment of clerk to justices: his tenure of office: not disqualified for election by being interested in a prosecution upon a borough commitment.

A clerk to the justices of a borough, appointed under stat. 5 & 6 W. 4, c. 76, s. 102, holds only during the pleasure of the justices; and therefore an information in the nature of *Quo warranto* will not lie for his office.

Where a person is interested in the prosecution of parties committed for trial by the justices of a borough, this does not disqualify him from being appointed clerk to the justices; nor is the office avoided if, after such appointment, he becomes so interested. He is only liable, under sect. 102, as having acted illegally. *Regina v. Fox*, 939

NEGLIGENCE.

I. Action for, against an attorney, for not applying, on behalf of his client, for an order of reference under Common Law Procedure Act, 1854. Under what circumstances he is liable, 396. *ATTORNEY*.

II. Against a railway Company, by administratrix of deceased, for keeping a crane on their premises in unsafe condition, whereby deceased was killed. Extent of liability of Company.

A railway Company carried goods on their rail, at mileage-rates, stipulating that the owners should unload them at the station. The Company kept a crane at the station, the use of which they allowed gratuitously to such owners, using it themselves when they unloaded goods there.

While an owner of goods, carried at mileage-rates, was so using the crane, the crane, owing to its being in an unsafe condition, as the company knew, broke. In a declaration against the Company for mischief thereby occasioned, plaintiff alleged that the Company had, for the purpose of enabling the owner to deliver the goods, provided the crane, which was necessary, and that the Company professed to the public that the crane was placed at the station for the purpose, and it was intended by them to be used for the purpose. The defendants having traversed this allegation, held that the finding should be in the affirmative.

The Company, on the arrival of the goods at the station, gave notice to the consignee and required him to remove them: he applied to the clerk at the railway station for assistance, and obtained the aid of servants of the Company, and, with them and his own servants, proceeded to raise the goods with the crane. The plaintiff alleged in the do-

claration that the Company requested the consignee to remove the goods by means of the crane. The defendants having traversed this allegation, held that the finding should be in the affirmative.

The consignee, while attempting to raise the goods by his own servants and those of the Company, requested B., who was the servant of neither, to assist, which B. was accordingly doing when the crane broke. The plaintiff alleged in the declaration that B. used the crane at the request of the Company. The defendants having traversed this declaration, held that the finding should be in the affirmative. And, further, that B. must be considered also as the servant of the consignee.

The action was brought, under stat. 9 & 10 Vict. c. 93, by the administratrix of B., who was killed by the accident. On a plea of Not guilty, held:

1. That defendants could not resist the action on the ground that it was for a tort arising out of the contract for carriage to which B. was not a party, inasmuch as there was in it no contract by defendants to supply the crane or any means of delivering the goods.

2. That defendants could not resist the action on the ground that they were merely gratuitous lenders for use, inasmuch as such a lender is, as between himself and the party to whom he lends, liable for mischief directly resulting from the unsafe condition of the article, if that be known to the lender.

3. But that the issue on this plea must be found for the defendants, because they had not lent the crane to B. at all, nor for the purpose of its being used by B. *Blakemore v. Bristol and Exeter Railway Company*, 1035

[III. Against a contractor under a board of health.

A contractor employed by a board of health to do a particular act, if guilty of negligence in doing the act, is personally liable for the consequences, and is not protected by the Health of Towns Act from being personally sued. *Arthy v. Coleman*, 1093]

IV. Against sheriff, for not arresting. See SHERIFF.]

NUISANCE.

Indictment for carrying on an offensive trade. Evidence not admissible of previous conviction before justices under stat. 16 & 17 Vict. c. 128, s. 1, 486. EVIDENCE, IV.

NUISANCES REMOVAL ACT.

(18 & 19 Vict. c. 121.)

I. Sects. 12, 13, 16, 40. What amounts to an

order for the execution of structural works, so as to admit of an appeal.

Under The Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), justices ordered a party, against whom complaint was made by The Nuisances Removal Committee, for causing a nuisance, "to abate and discontinue the said nuisance, and to do such works and acts as are necessary to abate the said nuisance, so that the same shall no longer be a nuisance;" and, if the order were not complied with, the Committee were authorized to enter upon the premises and do all such works, matters, or things as might be necessary for carrying the order into execution.

Held, that this was not an order for the execution of structural works, so as to be subject to appeal under sect. 16. And that therefore a penalty might be imposed for disobedience of the order, under sect. 14, notwithstanding the entry of an appeal against such order. And that, by sect. 39, the orders could not be brought up by certiorari.

Though it was deposed (upon application for a rule for certiorari and mandamus to compel the Sessions, under sect. 40, to hear the appeal) that the only proper and convenient mode of abating the nuisance was by constructing an underground drain of eight hundred feet in length. *Ex parte Mayor of Liverpool*, 537

II. Sect. 22. Assessment: extent of power of Local Authority as to assessment in respect of drainage.

Under The Nuisances Removal Act for England, 1855 (18 & 19 Vict. c. 121), the Local Authority in a district who have rendered innocuous a drain passing through their district, conveying away the filth of houses in a higher district, have no power to assess the owners of those houses for payment of the expenses, though those houses use this drain. The power of assessment of a Local Authority is confined to property within the district for which they act. *Regina v. Tatham*, 915

OBSTRUCTION.

What is, within the meaning of Metropolis Local Management Act, sect. 120, 1051. METROPOLIS LOCAL MANAGEMENT ACT, I.

OUSTER.

Evidence of, in trespass, I. EVIDENCE, I.

OXFORD.

Rating of University buildings, 184. RATE, I. I.

PANEL.

JURY.

PATENT.

I. Application of old machinery, in an old manner, to a subject analogous to the old subject: not the subject-matter of a patent.

A patent was taken out in 1853 for, amongst other things, improving the texture of the threads of cotton and linen yarns, by exposing the threads in a distended state to the action of beaters, the effect of which was to polish the sides of the threads and produce smoothness and a glacé effect. In 1856 the plaintiffs took out a patent for, amongst other things, an improvement in the finishing yarns of wool or hair, by exposing their threads in a distended state to the action of machinery, which, it was admitted, was substantially the same as the machinery described in the patent of 1853. The claim in the plaintiffs' specification was, amongst other things, to the invention of "causing yarns of wool or hair whilst distended and kept separate to be subjected to the action of rotatory beaters or burnishers, whereby the fibre is closed and strengthened, and the surface effectually polished." On the trial of an action for the infringement of the plaintiffs' patent, it was proved that the process of the patentees of 1853 had not previously been applied to wool or hair; and evidence was given that the effect upon wool was not the same as upon linen.

Held, by this Court, that the plaintiffs' specification claimed what was merely the application of the old machinery in the old manner to an analogous subject, and was not the subject-matter for which a patent could be claimed, and, consequently, that the plaintiffs' patent was wholly void. *Aliter*, if the claim had shown any novelty or invention in the mode of applying the old machinery to the new purpose. *Brook v. Aston*,
478

II. Specification: subsequent disclaimer, held valid under the statute. Effect of specification and disclaimer taken together: what amounts to an infringement.

S. took out a patent for "certain improvements in machinery or apparatus for preparing, slubbing, and roving cotton and other fibrous substances." In his specification he stated that "my invention consists in the application of the principle of centrifugal force in the flyers employed in the above-mentioned machinery, for the purpose of producing the required elasticity or pressure upon the bobbin, by causing the small spur, which conducts the sliver of cotton or other fibrous material on to the bobbin, to press or bear against the same simply by the action of such force." He added: "And in order more clearly to illustrate my invention, and the method of carrying the same into

practical effect, I have attached to these presents a sheet of drawings, representing one mode of applying the same to a flyer, as employed in an ordinary roving machine." He then, by reference to the drawings so attached minutely described a machine. He added: "I would here remark that I do not intend to confine myself to this particular method; but I claim as my invention the application of the law or principle of centrifugal force to the particular or special purpose above set forth; that is, to flyers used in machinery or apparatus for preparing, slubbing and roving cotton and other fibrous materials, for the purpose of producing a hard and evenly compressed bobbin."

Afterwards, under stat. 5 & 6 W. 4, c. 83, S. entered a disclaimer, reciting that "I have been advised that the claim of my invention, contained in the said specification, may be construed in such a manner as to be more extensive than I intended," and declaring that "I," "for the reason aforesaid, do hereby disclaim all application of the law or principle of centrifugal force as being part of my said invention, or as being comprised in my claim of invention, contained in the said specification, except only the application of centrifugal force by means of a weight acting upon a presser so as to cause it to press against a bobbin, as described in the said specification."

Held, by the Court of Queen's Bench, that this disclaimer was valid under the statute, and that the original specification and disclaimer being taken together, the result was a claim for only the machine particularly described. Held a correct view, by the majority of the Exchequer Chamber, the Court consisting of Williams, J., Martin, B., Willes, J., Bramwell, B., Watson, B., and Byles, J.

But held unanimously, by the Exchequer Chamber, that, on this view, the patent was not infringed upon by a machine differing from the machine particularly described. As, where S.'s machine produced the pressure by a centrifugal force urged by a weight attached to a lever projecting horizontally from the top of a vertical leg, but in the other machine the weight was partly distributed along a vertical flyer; though the two machines produced the same result by an application of the same principle. *Seed v. Higgins*,
755

III. Specification of plaintiff, claiming as new a method described in the specification of an earlier patentee: no user of his patent shown. How the question of novelty is to be put to the jury.

In an action for an infringement by defendant of plaintiff's patent, the defendant, to prove that plaintiff's patent was not new,

produced an earlier specification of a patent taken out by D., and contended that, upon a comparison of the two specifications, it appeared that the plaintiff claimed as new a method described in D.'s specification. No user of D.'s patent was shown.

The judge asked the jury whether a person of ordinary skill could, from D.'s specification alone, make the thing produced by plaintiff's patent: and they having answered in the negative, he directed a verdict for plaintiff.

Held, a misdirection: inasmuch as D.'s specification might insufficiently describe the process, even so as to make the specification bad, and yet might disclose enough to show that what was claimed in plaintiff's specification was not wholly new. *Bette v. Menzies*, 923

IV. Use of a subordinate part of a combination; when an infringement. Patent for combination not necessarily a claim of novelty as to each part.

A patent for a combination does not import a claim that each of its parts is new; and the patent may be valid though each part is old: but:

Held by the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, that the use of a subordinate part only of a combination may be an infringement of a patent for the combination if the part so used be new and material. *Lister v. Leather*, 1004

PAUPER.

POOR.

PILOT.

MERCHANT SHIPPING ACT, III, IV.

PLEADING.

Plea to a declaration charging defendants with building so as to obstruct plaintiff's land. General form of plea, justifying under statutory powers.

Declaration stated that defendants erected a bridge across a certain canal, part of the bed of which belonged to plaintiff, and also erected certain walls adjoining, and caused the said bridge and walls to be so constructed as to project over parts of the said land of the plaintiff.

Plea, that the several acts, matters, and things complained of were lawfully done by defendants under and by virtue of powers given to them by a certain Act of Parliament (setting out the year and title).

Held: that this general form of plea was good, and that it was not necessary to allege the particular facts upon which the defend-

ants relied as bringing them within the statute. *Beaver v. Mayor of Manchester*, 44

POLICY.

INSURANCE.

POOR.

I. Settlement of.

i. Appeal against removal. Evidence of illegitimacy of pauper, such fact not having been stated in a previous order for her removal.

On a case from Sessions, upon appeal against the removal of R. from T. to C. in 1856, it was stated that in 1837 a woman named S. W., "and Ann, aged six weeks, her daughter," were removed by order from P. to C., and that in fact C. was then the place of settlement of both S. W. and Ann: that this order was not appealed against: and that Ann was born in P., and was the same person as R.: that C., the appellant parish, on the trial of the appeal, offered proof of the illegitimacy of R., and that the Sessions held that C. was precluded, by the order of 1837, from giving such proof, and affirmed the order of 1856.

This Court quashed the order of Sessions, holding that C. was not estopped from giving proof of the illegitimacy, inasmuch as, assuming the order of 1837 to assert the fact of legitimacy, that fact was immaterial to the removal of S. W. and Ann, and therefore was not admitted by not appealing against such removal. *Regina v. Caerwys*, 720

ii. Refusal by parish officers to receive a pauper, in obedience to an order of removal: remedy.

The Court will not grant a mandamus requiring parish officers to receive a pauper in obedience to an order of removal. The proper course is by indictment. *Ex parte Overseers of Downton*, 856

II. Costs of maintenance.

i. Under stat. 11 & 12 Vict. c. 110, s. 3.

Stat. 11 & 12 Vict. c. 110, s. 3 (which enacts that the costs incurred for paupers rendered irremovable by stat. 9 & 10 Vict. c. 66, shall, when the parish is comprised in an Union formed under stat. 4 & 5 W. 4, c. 76, be charged to the common fund of such Union) is applicable to the case of a pauper whose settlement is not known, it not being known that he has no settlement, and who has resided without interruption for five years in a parish in an Union, so that, if his settlement were found to be elsewhere, he would still not be removable. *Re Bodminster Union*, 573

ii. Of lunatics, without an ascertained settlement, sent to an asylum, from a borough

having a separate quarter sessions. When borough is liable.

Under stat. 18 & 19 Vict. c. 105, s. 14, if lunatics whose settlement cannot be ascertained are sent to an asylum from a borough having a separate Court of Quarter Sessions, the borough is liable to the expenses if it does not contribute to the county rate under stat. 5 & 6 W. 4, c. 76, s. 117, and is not liable if it does so contribute. The words of the Act being clear, though there is no apparent reason for the enactment, the Court must enforce it. *Guardians of Birmingham v. Beaumont*, 870

iii. Of criminal lunatics: course of practice as to appeals against orders of adjudication of settlement and maintenance.

Appeals against orders of adjudication of settlement and maintenance of criminal pauper lunatics, under stat. 3 & 4 Vict. c. 54, ss. 2, 5, are regulated, as to notice and time for appealing, by stat. 11 & 12 Vict. c. 31, s. 9.

Where such an order was served on Guardians of an Union eighteen days before the next Sessions, and the guardians gave notice of appeal after that Sessions, nineteen days from the service: Held, that the appeal was triable at the Sessions next following such notice of appeal. *Regina v. Justices of Glamorganshire*, 694

III. Poor-rate. RATE, I.

PRACTICE.

I. In the Superior Courts.

- i. Count for damages, containing a prayer for a mandamus, under Common Law Procedure Act, 1854. The Court will suspend the mandamus granted, where an issue of fact, under the same count, is pending, 512. COMMON LAW PROCEDURE ACTS, III.
- ii. An appeal against the rule directing how the verdict shall be entered, and a suggestion of error in the judgment on the verdict, may be made at the same time and argued together, 232. INSURANCE, II.
- iii. Allowance of some, and disallowance and reduction of other, particulars of demand, by the Master. Distributive entry of verdict: allowance of costs on taxation, 161. VERDICT.
- iv. Case stated by justices. Course of practice, when the case, on being brought before the Superior Court, appears defective, 992. RATE, II. ii.

II. At Quarter Sessions.

- i. Notice of appeal to Sessions opened on one day and adjourned to another, when to be given, 563. HIGHWAY ACT, I.
- ii. Course of practice in appeals against orders of adjudication of settlement and

maintenance of criminal pauper lunatics, 694. POOR, II. iii.

iii. Appeal, under Highway Act, against a certificate of justices for stopping a highway; within what time to be brought. General practice on appeals at Quarter Sessions, 563. HIGHWAY ACT, I.

PRINCIPAL AND AGENT.

I. Contract by testator representing himself *bonâ fide*, but in mistake, as agent: his representatives liable to the other contractor, upon repudiation by the alleged principal.

Defendant's testator, W., professing to act as agent for G., made an agreement with the plaintiff for the lease of a farm belonging to G., and signed it "W., agent to G., lessor." He had not, in fact, authority from G.

Held on appeal, in affirmance of the judgment of the Queen's Bench, by the Court of Exchequer Chamber (Cockburn, C. J., dissentiente), that there was a contract on the part of W. that he had authority, on which his representatives were liable.

Plaintiff instituted a suit for specific performance against G. Plaintiff gave notice, on hearing that G. denied the authority of W., to W. that plaintiff would proceed with the suit at W.'s risk, unless W. gave him notice not to proceed; and, in the event of his bill being dismissed on account of absence of authority, would hold W. liable. W. answered by denying all liability, but without retracting his assertion that he had authority. The bill was dismissed on the ground of W.'s want of authority.

Held by the Exchequer Chamber (in affirmance of the decision of the Queen's Bench), that the testator was liable for the costs of the suit, they being, under the circumstances, a natural and direct consequence of the contract that there was authority. *Collen v. Wright*, 647

II. What is a sufficient written ratification by a principal of the act of his agent to constitute a signed memorandum within the Statute of Frauds, 664. STATUTE OF FRAUDS.

[PRIVILEGE.]

Of party from arrest. See ARREST, I.]

PUBLIC HEALTH ACT.

(11 & 12 Vict. c. 63.)

- I. Sect. 88. District rates, how to be levied, 116. RATE, III. i.
- II. Sect. 89. Retrospective rates; judgment against a Local Board for a debt; a "charge" for which a retrospective rate may be levied. Authority of Board to agree to a stay of execution; effect of such agreement.

Mandamus commanding a Local Board of Health to make a rate for the purpose of defraying a debt due to the prosecutors. On the record it appeared that the debt was due to the prosecutors, who commenced an action against the Local Board. The Local Board consented to a Judge's order, under which judgment was signed with a stay of execution for several months.

The prosecutors not having obtained satisfaction, this writ was issued more than six months after judgment had been signed, but within six months of the time to which execution had been stayed. The Local Board resisted on the ground that by The Public Health Act, 1848 (11 & 12 Vict. c. 63, s. 89), they had not power to levy retrospective rates save for charges and expenses incurred within six months before the making of the rate. On demurrer:

Held, that a judgment obtained against a Local Board was a charge within the meaning of the Act, and that a rate might be made to defray it within six months of that charge.

Held, also, that it was not beyond the authority of the Local Board to agree that execution should be stayed for a time; and that, this having been done, the period within which the rate might be made was six months from the time when execution might first have been issued.

Judgment for the Crown. *Regina v. Rotherham Local Board*, 906

III. Sect. 103. Mode of publication of rate; rate not void by reason of not having been so published, 321. RATE, III. iii.

IV. Sect. 140. Liability of officer of Local Board, in the case of a distress, 321. RATE, III. iii.

V. Sect. 144. Compensation clause. Does not apply to the case of injury by works ordered by a Local Board, and negligently executed by their agents. But Board are liable to an action.

In an action brought against The Local Board of Health of S., it was averred in the declaration that the defendants were The Local Board of Health of S., i. e., The Local Board of Health duly established and constituted according to law, in and for the entire area, places and parts of places within the boundaries of S., as the same were fixed by The Municipal Corporation Act; and that the defendants, acting as such Local Board as aforesaid, conducted themselves so wrongfully, improperly, and negligently, and with such want of due and proper care in the construction, management, and direction of a certain sewer and certain sewage within their said district, that, by and through means of the wrongful, improper, and negligent conduct of the defendants, and their want of due and proper care as

such Local Board as aforesaid in and about the premises, great quantities of filth and sewage-matter were poured in and upon certain canals, approaches and works of a certain bridge, of which the plaintiffs were the proprietors.

Held, upon demurrer to the declaration, that such an action for negligence was properly brought against The Local Board of Health, eo nomine; for that such a wrong was not the subject of compensation under sect. 144 of The Public Health Act, 1848 (stat. 11 & 12 Vict. c. 63), and that it was contemplated in sect. 139 that an action might be maintained for such a wrong against the Local Board eo nomine.

Quare, whether the Local Board are authorized by the statute to pay the damages recovered in such an action out of any of the rates which they are authorized to levy by the Act. *Southampton and Itchin Bridge Company v. Local Board of Southampton*, 801

VI. Highways within district of a Local Board, to be maintained by a district, not a highway rates, 535. HIGHWAY, I. i.

QUO WARRANTO.

Does not lie to remove a clerk to justices of a borough, appointed under stat. 5 & 6 W. 4, c. 76, 939. MUNICIPAL CORPORATIONS REFORM ACT, II.

RAILWAY.

I. Arch under, enclosed and used as a stable; within exemption (as to fees to surveyor for alterations) of sect. 6 of Metropolitan Building Act, 728. METROPOLITAN BUILDING ACT, II.

II. Bridge carried over railway by Company. Extent of their liability to repair, under sect. 46 of Railways Clauses Consolidation Act, 836. RAILWAYS CLAUSES CONSOLIDATION ACT.

RAILWAYS CLAUSES CONSOLIDATION ACT.

(8 & 9 Vict. c. 20.)

Sect. 46. Extent of liability of Company to repair bridge and road carried by them over a railway.

Under sect. 46 of The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), a railway company, having carried a road over the railway by a bridge, is bound to keep both bridge and road, and all the approaches thereto, in repair; and such repair includes not only the structure of the bridge and the approaches, but the metalling of the road on both. *North Staffordshire Railway Company v. Dale*, 836

RAILWAY COMPANY.

COMPANY, III.

RATE.

I. Poor-rate.

1. Oxford. University and College buildings, how rateable.

The Court takes judicial notice that the University of Oxford is a national institution, the purposes of which are the advancement of religion and learning.

Therefore it is not liable to poor-rate in respect of property occupied by it for these purposes solely.

The Bodleian Library is occupied by the University: access to it is given, under certain regulations, to members of the University and others; by statute it is entitled to a copy of any book entered at Stationers' Hall; it has an endowment for its repairs and for the purchase of books, to which purchase also members of the University contribute by fees at matriculation and on other occasions; visitors commonly pay a gratuity to the janitor. Held, that for such occupation the University is not liable to poor-rate.

The schools in which examinations are carried on, and in which is furniture for the accommodation of examiners, candidates, and spectators, are not so occupied as to cause a liability to poor-rate, although the candidates pay fees, which go in part to the salary of the examiners, the residue being furnished by the University.

The Convocation House is used by the University for conferring degrees, and for the transaction of such business as is brought before the Convocation; and in one of the rooms fees are paid on admission to the degrees, which go to the University. Held, not a rateable occupation, it being presumable that no pecuniary profit is derived to the University from the degrees. The room last mentioned is also used as the University Court for the recovery of debts: held not to be a rateable occupation.

The Old Convocation House and Law School are used, by the allowance of the University, for professors, who lecture therein and receive fees from the students: also, a fire engine is kept there. Held, not a rateable occupation.

The Sheldonian Theatre is used for the meeting of convocation, when the attendance is too large for the ordinary convocation house, for the periodical recital of prize compositions, and also, occasionally, for the academical exercises of graduates in music, in respect of which fees are paid to the University. Held, not a rateable occupation. And that it makes no difference that the University occasionally allows the use of the

theatre to persons giving concerts for their own profit. But the University allows a publisher constantly to keep some of his books in a cellar of the building. Held, that this is a rateable occupation, although the publisher pays no rent.

The Ashmolean Museum is used as a laboratory and as a place of deposit of specimens of natural history, curiosities, and antiquities. Held that, so far, there is no rateable occupation. Part of it is occupied as the residence of a professor. Held, that this is a rateable occupation, it not appearing that such residence is essential to the discharge of the professor's duties.

The Clarendon Buildings are used as the University police-rooms, as cells for prisoners, and as a residence for a superintendent, whose enjoyment does not appear in fact to be in excess of the occupation requisite for the performance of his office. In part, a council of the University holds meetings. In part, the magisterial business of the University is transacted. Part is used for the registrar. Part is used as lecture rooms, and for geological specimens. Held, not a rateable occupation.

The Botanic Garden is used, by the University, for the growth of trees and plants exclusively for scientific purposes. Held, not a rateable occupation. Attached to it are residences and land occupied by the professor of botany and a gardener. Held, that such occupation is rateable.

The Taylor Institution is a building used for the teaching of European languages, and contains a library and lecture-rooms. Held, not a rateable occupation. A librarian and a porter reside there. Held, that such occupation is rateable so far as, if at all, the accommodation enjoyed is in excess of what is necessary for the performance of their public duties.

The University Galleries contain paintings, sculpture, and other works of art. Held, not a rateable occupation.

The colleges of the University are not recognised as public institutions in the sense in which the University itself is so recognised. And therefore the college, libraries, and chapels, though used exclusively for the purposes of collegiate instruction, discipline, and worship, are subjects of rateable occupation. *Oxford Rate*, 184

ii. Governor of a garrison town, government storekeeper or porter, employed by Crown in the public service, and occupying Crown premises for the purpose, when and how rateable.

A storekeeper or porter employed by the Crown in the public service, occupying premises belonging to the Crown for the purpose

of performing such service, is not rateable in respect of such occupation, although it constitutes part of the emolument of his office. But, if he have an occupation of more than is reasonably necessary for the performance of such service, he is rateable in respect of the excess, and of no more. In estimating the question of excess, the station of the party employed should be taken into consideration; and reasonable accommodation for his family will not constitute an excess. An excess which is merely trifling ought to be disregarded.

The same rule applies to the governor of a garrison town, occupying Crown property within the town, though he is also commanding officer of a military district much more extensive than the town.

The rule is applicable, though none of the duties are executed in the premises occupied. *Regina v. Stewart*, 360

iii. Rateability of barge, moored in the Thames, and used as a floating pier.

F. moored a barge in the Thames between high and low water mark: the moorings were stationary, in the bed of the river; and the barge floated at high water and grounded at low water on the posts in the bed of the Thames by which it was moored, and which were in the parish of G. The barge was connected by a chain with stairs on the land, the soil of which was not the property or in the occupation of A., and which was at that point a common highway to the Thames. Movable planks were laid from the shore on to the barge, and thence to another barge moored farther out in the Thames, and which always floated. By this means a pier was constructed, which was permanently kept there and used for embarking in steamboats, and landing from them; and F. was remunerated by the parties so using; and he had the sole control of the pier.

Held that he was rateable to the poor-rate for G., as occupier of land in the bed of the river. *Forrest v. Overseers of Greenwich*, 890

iv. Seashore, between high and low water mark: no presumption that it forms part of the contiguous parish.

The portion of land on the seashore between ordinary high-water mark and ordinary low-water mark may form part of the parish coming down to the shore; but there is no *prima facie* presumption that it does so; and, in the absence of evidence that it does form part of the parish, it must be taken not to be part of it. *Regina v. Musson*, 900

v. Costs of appeal against a poor-rate made under a local Act: taxed by recorder: order for costs drawn up at subsequent sessions, before deputy recorder, a rated

inhabitant, held voidable, 637. *Costs*, I. ii. (2).

II. Under Metropolis Local Management Act.

i. General rate, including paving-rate, upon The London Dock Company, previously assessed for paving-rate under local Act. Principle of assessment.

Under The Metropolitan Local Management Act, 18 & 19 Vict. c. 120, s. 159, where it appears to a parish vestry that part of the expenses, for defraying which a sum is ordered to be levied, is incurred for the special benefit of any particular part of the parish, or not for the equal benefit of the whole parish, the vestry may direct the expenses to be levied in part, or exempt a part, of the parish accordingly. By sect. 161 the general rates are to be levied in respect of property rateable to the poor.

Docks had been, before the Act, assessed at a certain value for paving-rate, under former Acts, which directed that the paving-rate should be laid on occupiers of premises in the streets paved, or adjoining to or opening into the same. After this Act, a general rate, including paving-rate, was laid on, in which the value, in respect of the docks, was assessed upon the whole dock property indiscriminately, so as much to exceed the former valuation; and the vestry expressly resolved that the owners were not entitled to any exemption: but a case was stated, in which it was agreed that this Court should act as on a case stated on appeal at Quarter Sessions.

The Court laid down that the rate ought to be amended, so far as it appeared that there were distinct parts of the dock property deriving no benefit from the paving, or a less direct benefit than other parts of the parish. As, for instance, in respect of the area of the basin covered by water and used only by ships, and of bonding warehouses on the dock quays, where goods were unshipped and warehoused, and afterwards exported, without inland transit. *Howell v. London Dock Company*, 212

ii. Rate by "Guardians" of the poor, under a local Act, under a precept by the vestry directed to the "Overseers" of such parish, in obedience to a precept from the Metropolitan Board of Works. What is a valid precept by the vestry, and rate by the Guardians.

A case having been stated by justices under stat. 20 & 21 Vict. c. 43, a rule obtained by the appellant, calling on the respondents to show cause why it should not be sent back to the justices to set forth the grounds of the determination more fully, was discharged. *Semble*, that, unless something appeared equivalent to a refusal on the

part of the justices to state the case, the practice should be to apply to the Court at the time of the argument to send the case for amendment if it then appears to them to be defective.

Under the Metropolitan Local Management Act (18 & 19 Vict. c. 120), a precept was directed by the Metropolitan Board of Works to the vestry of a parish to raise a sum of money, as being the proportion chargeable on the parish for the expenses of the Board. The vestry made a precept directed to the overseers of the parish, requiring them to make a rate for that purpose. By a local Act, the affairs of the poor of the parish are committed to guardians. The precept was delivered to the Guardians, who made a rate in obedience to it, signed by their own names.

Held that the Guardians were overseers within the Act, and the rate was not objectionable on these grounds.

The rate did not state on the face of it the issuing of the precepts.

Held that the rate was sufficient, though not showing on the face of it the source of the authority of those who made it. *Christie v. Guardians of St. Luke, Chelsea*, 992

III. Under Public Health Act.

- i. Real property within the district of a Local Board; when assessable to a district rate.

Real property within the district of a Local Board of Health cannot be assessed to a district rate, unless there be some person having such an occupation as would make him liable to the poor-rate in respect thereof. *Hodgson v. Local Board of Health of Carlisle*, 116

- ii. Judgment against a local board for a debt; a "charge" for which a retrospective rate may be levied: authority of board to agree to a stay of execution: effect of such agreement, 906. PUBLIC HEALTH ACT, II.

- iii. Mode of publication of rates. Rate not void by reason of not having been so published.

The Public Health Act, 1848 (11 & 12 Vict. c. 63), sect. 103, enacts that all rates made or collected under it "shall be published in the same manner as poor-rates." Held, that a rate, made under the Act, was not null and void by reason of not having been so published: that on a summons before justices to enforce it, the rate not having been appealed against, they were justified in refusing, as immaterial, evidence of non-publication: and that therefore the officer executing their distress warrant was protected by it. *Le Feuvre v. Miller*, 321

- iv. Highways within the district of a Local

Board, to be maintained by a district, not a highway, rate; 535. HIGHWAY, I. i.

IV. Under Nuisances Removal Act.

Local authority: extent of their power of assessment, in respect of drainage, 915. NUISANCES REMOVAL ACT, II.

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To arbitration. COMMON LAW PROCEDURE ACTS, I.

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Between high and low water mark: no presumption that it forms part of the contiguous parish, 900. RATE, I. iv.

SESSIONS.

- I. Removal of orders of Sessions into Court of Queen's Bench, under stat. 12 & 13 Vict. c. 45, s. 18.

The provisions of stat. 12 & 13 Vict. c. 45, s. 18, for enforcing orders of Sessions, apply only to orders properly so called, and not to judgments of the Court of Quarter Sessions on indictments tried before them. *Regina v. Bateman*, 584

- II. Notice of appeal to Sessions opened on one day and adjourned to another; when to be given, 563. HIGHWAY ACT, I.

- III. Appeals against orders of adjudication of settlement and maintenance of criminal pauper lunatics. Course of practice, 694. POOR, II. iii.

- IV. Dismissal for want of jurisdiction, of an appeal against the allowance of a parish surveyor's accounts. Jurisdiction of Sessions as to costs, 704. COSTS, I. ii. (1).

- V. Costs of appeal against a rate under a local

Act, taxed by the recorder: order for costs made at subsequent Sessions before deputy recorder, a rated inhabitant: held voidable, 637. Costs, I. II. (2).

SET-OFF.

Cannot be claimed of a loss on a policy, underwritten by a testator with a broker, against amount due to the executors from the broker for premiums.

There is no right either at law or in equity to deduct a loss on a policy, underwritten by a testator with a broker, from the amount due to the executors for premiums from the same broker, though the circumstances are such as in case of bankruptcy would support a plea of mutual credit.

A custom that in case of the death of an underwriter the premiums should be retained till all the risks had run off might give such a right. But this Court, in a case where they had power to draw inferences of fact from the evidence, drew the inference that such a custom did not exist at Lloyd's. *Beckwith v. Bullen*, 683

SETTLEMENT.

Of paupers. *Poor, L.*

SHAREHOLDER.

COMPANY, I. II.

[SHERIFF.

Action against, for not arresting on *capias*.

The sheriff S. held a *ca. sa.* against B., lodged by L. more than a year before. A writ at suit of A., but void on the face of it, was then handed to S., who issued his warrant to his officer, who arrested B. thereon. B. applied to a judge at chambers and was discharged, whereon S. claimed to detain him on L.'s writ. But the judge discharged B. absolutely, and he left the country. L. then sued S. for negligence, the declaration alleging as the first breach the non-arrest, and as a second breach the arrest of B. on an invalid writ, whereby B. was discharged, and thereby L.'s writ became useless. S. pleaded not guilty to the whole declaration, and traversed particular allegations. The judge at the trial ruled that there had been no arrest on L.'s writ; that it was for the jury to say if S. was guilty of negligence towards L. in not knowing that A.'s writ was invalid; and that B. was set free from all writs by his discharge, which was no justification of S. The jury having found for the plaintiff, except on the issue on the second breach, and a bill of exceptions being tendered:

Held, affirming the judgment of the Ex.

Ch. (Wightman, J., Erle, J., Martin, B., and Bramwell, B., dissenting), that the ruling was right.

Where the sheriff has arrested on one good and valid writ, he may detain on any number of valid writs which he had at the time of the arrest, or which may afterwards have reached him. But in the case of an arrest on an invalid writ it is different. Though the party arrested has been deprived of his liberty, that has been done in circumstances which make it the duty of the sheriff to discharge him. He has no right to treat him as a person deprived of his liberty, and an arrest on the valid writ is therefore necessary. But to allow the sheriff to make such an arrest, while the party is unlawfully confined by him, would be to permit him to profit by his own wrong, and therefore cannot be tolerated. The sheriff cannot arrest him, because he has already been deprived of his liberty; the sheriff cannot detain him, because he is entitled to be discharged.

If the sheriff, by the illegal act of himself or his officer, has taken a person unlawfully into custody, so that the custody amounts to a false imprisonment, the sheriff cannot avail himself of that illegal detention to execute against his body other writs which he holds at the suit of other plaintiffs.

The liberty of the subject requires that a person illegally arrested should have an absolute unqualified right against the person who has illegally arrested him, to be set at large without reference to what may be the consequence of his liberation to others.

Though for some purposes the sheriff is the agent of the party who puts a writ into his hands, he is not a mere agent. He is a public functionary having duties to perform as well towards those against whom the writs in his hands are directed as towards those who put those writs into his hands. *Hooper v. Lane*, 1095]

SHIP.

I. The property in.

- i. Mortgage by registered owner, 789. *MERCHANT SHIPPING ACT, II.*
- ii. Penalty for refusing to deliver up certificate of registry, 823. *MERCHANT SHIPPING ACT, I.*

II. The voyage.

- i. In what cases the master is exempted from the necessity of employing a licensed pilot, 445. *MERCHANT SHIPPING ACT, IV.*
- ii. Pilot, when liable to penalty for refusing to deliver up license, 723. *MERCHANT SHIPPING ACT, III.*

III. Freight.

- i. To whom it passes, upon abandonment of

the ship to her assurers by the owner, when the goods are the owner's, and carried on his own account; ship and freight being separately insured, 493. **INSURANCE (MARINE), I.**

- ii. Lien for, by shipowner as against consignee of goods; not waived by express agreement in bill of lading that the freight is to be paid by the shipper.

S. shipped goods on board plaintiff's ship, then at Glasgow, and bound for Lima. By the bill of lading the goods were to be delivered at Lima to defendant, "freight for the said goods to be paid by the shipper;" and in the margin was written: "freight payable one month after sailing, ship lost or not lost." S. handed the bill of lading to defendant's house at Glasgow (defendant having one also at Lima), who made thereon an advance to S.; the goods were consigned to defendant by S. for sale. S. did not pay the freight in the month; and plaintiff wrote to the master, informing him of this, and desiring him not to deliver the goods without payment of freight. Defendant at Lima demanded the goods; but the master, who had received the letter at Lima, refused to deliver them without payment of freight.

Held that the master was justified in detaining them, the lien for freight as against the consignee not being waived by the terms of the bill of lading. *Neish v. Graham*, 505

IV. Insurance of. **INSURANCE (MARINE).**

SLAUGHTER-HOUSE.

Provisions of Chorley Improvement Act, as to slaughtering of cattle: construction.

By The Chorley Improvement Act, 1858 (16 & 17 Vict. c. clxxxi., local and personal, public), it is enacted, sect. 84, in language similar to that of sect. 19 of The Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), that "no person shall slaughter any cattle, or dress any carcase, for sale as human food or food of man, in any places within the limits, other than" such slaughter-house as there described; and that every person who "shall offend by slaughtering any cattle or dressing for sale any carcase within the limits in any place other than one of such slaughter-houses," shall be liable to a penalty.

Held that this enactment applies only to the slaughtering of beasts intended by the person slaughtering for sale as human food. *Elias v. Nightingale*, 698

SPECIFICATION.

PATENT.

STATEMENT.

Of account. **ACCOUNT.**

STATUTE.

General form of plea, to an action for obstruction of plaintiff's land by building, that the acts complained of were done in exercise of powers under a certain Act, 44. **PLEADING.**

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5 G. 4, c. 83. (Punishment of Rogues and Vagabonds).

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- 19 & 20 Vict. c. 108. (County Courts Amendment).
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865. COUNTY COURT, I. i.

20 & 21 Vict. c. 43. (Summary Proceedings
before Justices).

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NERALES.*

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30 G. 3, c. 69. (St. James's Clerkenwell. Pen-
tonville Chapel of Ease), 8. CLERK, III.

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952. TITHES VALUER.

STATUTE OF FRAUDS.

(29 CAR. 2, c. 3).

Sect. 4. What is a sufficient written ratifica-
tion by a principal of the act of his agent to
constitute a signed memorandum within the
statute.

Defendant employed R., as his agent, to
agree with plaintiff for the purchase of plain-
tiff's leasehold interest in a house. Plaintiff
also held stables under a demise distinct
from that under which he held the house,
and for a longer term. Defendant did not
authorize R. to purchase the lease of the
stables; and R. had represented to defendant
that he had taken the lease of the house
only; but in fact R. had taken from the
plaintiff an agreement in writing for the
purchase of the lease of the house, in which
was also the following clause: "I further
agree to let to" defendant the stable "for the
same rent and subject to the same conditions
that I hold them myself." Afterwards plain-
tiff wrote to defendant stating that such was
the bargain, adding that the stables were to
be sublet for a term of five years only. This
was in fact the same period as the residue of
the lease of the house; but it was not so
stated in the letter. There was nothing else to
indicate for what term the lease of the stables
was to be. Defendant wrote and signed an
answer, which the Court of Queen's Bench
construed to be a ratification of whatever

bargain R. had in fact made for him, and
to constitute with the previous letters a suffi-
cient signed memorandum in writing to
charge defendant with the agreement for the
sublease of the stables.

Held by the Exchequer Chamber, reversing
the decision of the Queen's Bench, that it did
not appear on the face of the writing that
the parties were agreed as to the term for
which the sublease was to be, and that there
was therefore either no complete agreement,
or, if there was a complete agreement, no
sufficient memorandum of it. *Bailey v. Fitz-
maurice*, 664

STATUTE OF LIMITATIONS.

I. Action for maliciously procuring opposition
to discharge of insolvent, and lodging a de-
tainer, after order of discharge, whereby
plaintiff was detained in prison: when the
cause of action accrued.

Action for wilfully and maliciously pro-
curing E., as creditor of plaintiff, to oppose
the discharge of plaintiff by the Insolvent
Debtors Court, and for wilfully and mali-
ciously obtaining from T. an affidavit contain-
ing, to defendant's knowledge, a false state-
ment, and for using the affidavit in the oppo-
sition; by reason of which plaintiff was ad-
judged to be discharged as soon as he should
have been in custody sixteen months from
the date of the order at the suit of E.: and
that, by reason of the premises, and of a
detainer lodged by defendant at the suit of E.
while plaintiff continued in custody and be-
fore the expiration of the sixteen months,
plaintiff did not enjoy the benefit of the Act
so soon as he otherwise would, and was de-
tained in prison.

The action was commenced more than six
years from the order of the Court and the
lodging of the detainer, but within six years
of the termination of the imprisonment.
Held: that the action was barred by the
Statute of Limitations. *Violet v. Symson*,
344

II. Mercantile Law Amendment Act, sect. 10,
providing that imprisonment at the time
when the cause of action accrued is not to
defeat the operation of the Statute of Limita-
tions, applies to cases where such cause
accrued before the passing of the former
Act, 429. *MERCANTILE LAW AMENDMENT
ACT, I.*

III. Mercantile Law Amendment Act, ousting
operation of Statute of Limitations where
principal or interest has been paid by a co-
contractor, does not apply to the case of
such payment before the passing of the Act,
though the action be brought after, 778.
MERCANTILE LAW AMENDMENT ACT, II.

STEAM-ENGINE.

Used exclusively for, and travelling for the purpose of being used with, a thrashing-machine; exempt from toll.

Under stats. 3 G. 4, c. 126, s. 32, and 14 & 15 Vict. c. 38, s. 4, a steam-engine used exclusively for working a thrashing-machine belonging to the same owner, and passing a turnpike-gate at the same time with the thrashing-machine, but in a separate cart, is exempted from toll as an implement of husbandry.

Although the steam-engine be capable of being applied to other purposes. *Regina v. Maltby*, 712

STOPPAGE IN TRANSITU.

VENDOR AND VENDEE, III.

STOREKEEPER.

Employed by Crown, and occupying Crown property in that capacity; when and how rateable, 360. *RATE*, I. ii.

STREET.

What is a "part of a street," within the meaning of Metropolis Local Management Act, 1054. *METROPOLIS LOCAL MANAGEMENT ACT*, I.

SUPPORT.

Nature of right to, in owner of surface, as against owner of mine, 123. *MINE*.

SURFACE.

Owner of: nature of his right to support, as against owner of mine, 123. *MINE*.

SURVEYOR.

I. Of highways.

i. No appeal by, against order of justices disallowing his accounts, 557. *HIGHWAY ACT*, III.

ii. Dismissal for want of jurisdiction, of appeal against allowance of surveyor's accounts. Jurisdiction of Sessions as to costs, 704. *COSTS*, I. ii. (1).

II. Under Metropolitan Building Act. *METROPOLITAN BUILDING ACT*.

TENDER.

Of rent. *LANDLORD AND TENANT*, II. 1.

THRASHING-MACHINE.

STEAM-ENGINE.

TITHE VALUER.

Under private Act, 5 G. 4, c. 28. Administration of oath. Construction of "not interested in the said tithes or dues," sect. 30. Jurisdiction of Sessions.

By a private Act, 5 G. 4, c. 28, no person appointed to act as tithe valuer shall be capable of acting, &c., until he shall have taken and subscribed an oath in the words following: I, A. B., do swear that I will faithfully, &c., execute, &c. "So help me God." The oath had been subscribed with the omission of the words "So help me God." Held: that the oath had nevertheless been properly administered according to the statute; for the words omitted were no part of the oath, but only an indication of the manner of administering it.

By the same statute, certain tithes and dues were commuted for a specific corn-rent, to be raised by assessment upon the landowners; and by sect. 30, the Court of Quarter Sessions, once in every ten years, upon application to be made to them by certain landowners to appoint a person to make a new valuation, &c., of all the lands, &c., within the township, &c., and again to apportion, &c., the respective annual sums which each and every of the owner or owners, &c., shall or ought to be charged with, &c., was required, by order of the said Court, to nominate and appoint one or more fit and proper person or persons, not interested in the said tithes or dues, and not being the steward or agent of any person so interested, to make a new valuation and assessment, &c. In an action of replevin, upon a distress for a sum for which the plaintiffs had been assessed in pursuance of such a valuation, it was contended that the land was not liable, because the appointed tithe valuer, who was a shareholder in a railway passing through the township, was interested in the tithes and dues; that the Sessions had consequently no jurisdiction to appoint him; and that therefore his acts were null and void.

Held, assuming him to be interested within the meaning of the section, and that the order appointing him might have been brought up by certiorari and quashed, that as the Sessions had jurisdiction to inquire and determine whether he was interested and the appointment had not been set aside, he was de facto in the office of tithe valuer; and that consequently his acts done whilst so in office were not null and void, and could not be challenged in the action of replevin.

Semble that, upon a true construction of the section, he was not a person interested in the tithes and dues so as to make his appointment in any way objectionable, an earlier section of the Act distinguishing be-

tween persons interested in the lands and persons interested in the tithes. *Lancaster and Carlisle Railway Company v. Heaton*, 952

TOLL (TURNPIKE).

I. Steam-engine used with thrashing-machine, and travelling for that purpose, exempt from toll, 712. *STEAM-ENGINE*.

II. What user of a turnpike road is within the exemption, as to toll, of stat. 3 G. 4, c. 126, s. 4.

V., going in a carriage from his own house to a town, drove along a parish road; he then used a private road without any express license from the owner, and by that way entered the turnpike road; he then used the turnpike road for eighty-six yards, and then by parish roads reached the town, and returned by the same route. He could not by any other route have gone to the town without becoming liable to pay turnpike tolls.

Held that, assuming that V. used this route because by using any other he would become liable to pay toll, this was not an evasion of payment of toll within stat. 3 G. 4, c. 126, s. 41, but a successful arrangement to avoid becoming liable to payment.

Per Coleridge, J.: The user at different times of portions of the turnpike road, each less than one hundred yards, but taken together more than one hundred yards, does not deprive a party of the benefit of the exemption in stat. 3 G. 4, c. 126, s. 32. *Veitch v. Trustees of Exeter Roads*, 986

TRANSFER.

Of shares. *COMPANY, I., II.*

TRESPASS.

Evidence of ouster. *EVIDENCE, I.*

TURNPIKE.

TOLL.

UNDERWRITER.

INSURANCE (MARINE).

UNIVERSITY.

Of Oxford. Rating of. *RATE, I. I.*

VENDOR AND VENDEE.

I. Order for goods by vendee, followed by transmission, by vendor, of those goods, together with others, not ordered. Can vendee reject?

Action for goods sold and delivered. Plea, Never indebted. It appeared on the trial

that defendant ordered of plaintiff specified quantities of particular kinds of crockery to be sent to him by railway. Plaintiff sent a crate containing a smaller quantity of the particular goods, also other goods not ordered, and of such a nature as to be distinguishable from the others; and he sent one invoice debiting defendant with the whole contents of the crate. Defendant refused to receive them, assigning as his reason that they were out of time. At the trial, the objection was taken that defendant was not bound to take any part of the goods, because of the manner in which they were sent, accompanied by goods not ordered. Leave to enter a nonsuit on this ground was given, subject to which the case went to the jury, and the plaintiff had a verdict for the goods ordered.

Held by Lord Campbell, C. J., and Wightman, J., that, under these circumstances, the vendor had not furnished the goods so that the vendee was bound to accept them, and that there ought to have been a nonsuit.

Held by Coleridge and Erle, Js., that the vendee might have taken his own goods and rejected the excess.

The Court being equally divided, the rule dropped. *Levy v. Green*, 575

II. Action by vendee for non-delivery of goods.

Equitable plea by vendor, that the contract of sale was made by him upon a mistaken sample, and that notice was subsequently given to vendee. Equitable replication.

Declaration for non-delivery of 100 chests of tea ex the ship S., sold by the defendant to the plaintiff at a fixed price, with the usual averments that plaintiff was always ready and willing, &c., and that all conditions precedent were fulfilled. Equitable plea, that the tea was bought and sold upon a sample which the defendants believed to be a sample of the said tea ex the said ship, and that by the said contract the defendants agreed that the tea in the said 100 chests should be equal to the said sample; that the said sample was not a sample at all of the said 100 chests, but was a sample of a totally different tea; and that the defendants afterwards discovered that there had been a mistake respecting the said sample, and forthwith, and before the plaintiff had in any respect altered his position on account of the said contract having been made, gave notice of such mistake to the plaintiffs, and that the defendants would, on account of the said mistake, treat the contract as void; and the contract was entered into solely through the mistaken belief of both parties that the said sample was a sample of the 100 chests, and would not have been entered into but for the said mistake.

Held, upon demurrer to an equitable replication, that the plea was bad, because it

failed to show that a Court of Equity would have granted a simple relief in favour of the defendants against their liability to deliver the tea ex the ship *S. Scott v. Littledale*, 815

III. Stoppage in transitu. What is a termination of the transit. Rescinding of contract; mutual consent, to what extent necessary.

Goods were consigned from London to A. at Sunderland according to order; and a draft for the price, the invoice, and the bill of lading were forwarded. On the arrival of the goods at Sunderland A. was in difficulties, and desired that they should not be received from the wharf where they then lay. But in the absence of A., and without his consent, the goods were deposited on his premises. He afterwards knew of these facts, and took and kept the key of the warehouse in which the goods were deposited. On 4th February A. wrote to the plaintiff, the vendor, returning the draft unaccepted, and stating the circumstances as to the goods, and that a stoppage of his business was decided upon, and continued: "I immediately sent for my solicitor to get his advice, amongst other things, as to whether I could not, under the circumstances, return the hemp to the wharf. He declared not; which placed me under the necessity of depriving you of what I considered your right. I cannot say what dividend yet there is likely to be." "I return your draft, and, although it can be little satisfaction to you, must express my extreme regret that you are so unfortunately placed." On 6th February the vendor applied to A. for the goods, and was referred by him to his solicitor. On 25th February A. made an assignment to the defendants for the benefit of his creditors, and delivered the key of the warehouse to them. The goods were demanded of the defendants and were refused; and the defendants sold them.

Held, in an action of trover by the vendor, that the property in the hemp passed to A. by the delivery on board ship and the forwarding of the bill of lading: that there was no valid rescission of the contract; for that such can only be by mutual consent: that therefore any expression of a wish to rescind uttered by one party and not communicated to the other is immaterial: that the letter of 4th February, which was communicated to the vendor, did not amount to an offer by A. to rescind, but to an assertion that he could not do so: that there was no valid stoppage in transitu; for the natural transit was ended, and the facts showed that A. had taken to the goods as owner whilst they were in his possession.

By the Exchequer Chamber, affirming the judgment of the Queen's Bench. *Heinekey v. Earle*, 410

VERDICT.

I. Distributive entry of, upon allowance of some and disallowance and reduction of other particulars of demand, by the Master. Allowance of costs on taxation.

Debt for money had and received, in respect of sums paid, under protest, on the admission of plaintiff to copyhold premises, alleged to be charged in excess. Plea: Never indebted. The particulars of demand consisted of eleven items, amounting in all to 17*l.* 1*s.* On a case reserved, it appeared that plaintiff insisted that the principle on which the fees were charged was faulty, of which opinion was the Court in some instances, but not all: and they directed that the Master should reduce the charges, by allowing only a quantum meruit in respect to the greater part of the charges. On one item, 3*s.* for proclamations, the Master allowed the whole charge: on three items, he disallowed the charge altogether: and in all the others made a reduction: the whole reduction of defendant's charges amounted to 9*l.* 1*s.* 4*d.*

Held: that the defendants were entitled to have the verdict entered distributively, viz.: as to 9*l.* 1*s.* 4*d.* for the plaintiff, and as to the residue, 7*l.* 19*s.* 8*d.*, for the defendants: and that each party was to be allowed on taxation his costs in respect of so much as he had succeeded upon. *Traherne v. Gardner*, 161

II. A suggestion of error in the judgment on a verdict, and an appeal against the rule directing how the verdict shall be entered, may be made at the same time, and argued together, 232. *INSURANCE*, II.

VESTING ORDER.

BANKRUPT AND INSOLVENT.

VESTRY ROOM.

To a district chapel. The possession, in whom, 8. *CLERK*, III.

WARRANTY.

Truth of matters stated in a proposal for life insurance, and recited in policy; when a warranty, when not, 232. *INSURANCE*, II.

WILL.

Secondary evidence of contents of a second will; revoking the first; when admissible: onus of proof, where the presumption is that the second will was destroyed animo cancellandi.

A. executed a will, and afterwards executed a second will, which he took away with him. On his death the earlier will was found;

but the second will could not be found. The solicitor, who prepared the second will, gave evidence, from recollection, of its contents, which were inconsistent with the first will, and revoked it. On a case where the Court had power to draw inferences of fact:

Held, that secondary evidence might be given of the contents of the last will, and that the evidence given sufficiently showed that it revoked the first will.

That the facts that the second will was last seen in the custody of the deceased, and could not be found, raised a presumption that he had destroyed it, animo cancel-

landi, and cast on those seeking to establish the will the onus of rebutting that presumption; and, this not being done, the Court held that A. died intestate. *Brown v. Brown*, 876

WITNESS.

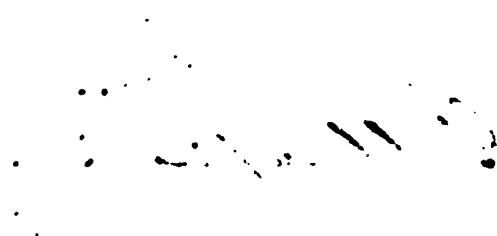
To bill of sale. BILL OF SALE.

WORKS.

Board of. METROPOLIS LOCAL MANAGEMENT Act.

Gillaspie

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